Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RODNEY REID,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Samuel W. Seymour
Counsel of Record
Nicolas Bourtin
Allison Caffarone
Lindsay M. Manning
David L. Breau
Thomas C. White
125 Broad Street
New York, NY 10004
(212) 558-4000
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. There is a split in the courts of appeals as to the following question: Whether a defendant's Confrontation Clause rights are violated when the trial court bars the defendant from cross-examining accomplice witnesses about the mandatory minimum sentences they avoided by cooperating with the government because of the court's concern that such cross-examination would alert the jury to the mandatory minimum sentences faced by the defendant.

2. Whether the separation of powers doctrine and Fifth Amendment Due Process Clause place any limits on prosecutorial discretion to charge one defendant with multiple counts pursuant to 18 U.S.C. § 924(c)—effectively imposing a life sentence against that defendant if convicted—while not so charging his more culpable co-defendants, resulting in a sentencing discrepancy of over one hundred years for similarly situated offenders who committed the same crimes.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Reid, a criminal defendant sentenced to approximately 119 years in prison, respectfully petitions for a writ of certiorari to review the November 12, 2008 judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Eastern District of New York dated December 28, 2007.

OPINIONS BELOW

The judgment of the district court is *United States* v. *Reid*, No. CR-05-596 (ARR) (E.D.N.Y. Dec. 28, 2007), and appears in the Appendix to this Petition at A11. The summary order of the Second Circuit is *United States* v. *Reid*, No. 08-0134-cr (2d Cir. Nov. 12, 2008), and appears in the Appendix at A58.

JURISDICTION

The court of appeals entered its judgment on November 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him."

18 U.S.C. § 924(c) provides in relevant part: "[A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of imprisonment of not less than 5 years . . . In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years."

STATEMENT OF THE CASE

A. Rodney Reid's Arrest and Trial

On December 14, 2002, after a standoff that lasted several hours, Rodney Reid, Sean Chaney, and Omar Jones were arrested in a hotel in connection with the robbery of a check cashing store. All three were prosecuted in state court. Messrs. Chaney and Jones pleaded guilty to robbery charges and received 5 years' imprisonment each. Mr. Reid was charged only with unlawful weapons possession offenses, was convicted at trial, and received a prison sentence of 10 years.

In August 2005, Messrs. Reid and Chaney were indicted by a federal grand jury in the Eastern District of New York and charged with one count of conspiring to violate the Hobbs Act, 18 U.S.C. § 1951(a), seven substantive Hobbs Act counts for

robberies of commercial establishments in Queens and Nassau County, New York—including the robbery that was the subject of the state prosecution—and, in contravention of Department of Justice policy, seven related firearms counts under 18 U.S.C. § 924(c). Mr. Chaney pleaded guilty to a Hobbs Act robbery conspiracy, one count of Hobbs Act robbery, and a single count of violating Section 924(c).

Mr. Reid invoked his constitutional right to trial. The government's evidence at trial consisted of three cooperating witnesses who were alleged to be co-conspirators in the robberies,[1] as well as multiple robbery victims, none of whom ever identified Mr. Reid as one of the robbers and none of whom testified that he or she had ever seen Mr. Reid before.

The jury in Mr. Reid's trial was unaware of the consequences of convicting him of multiple counts of Section 924(c)—namely, that the trial court would have no discretion but to impose a seven-year sentence for the first such count of conviction and consecutive *twenty-five year* sentences for each count of conviction thereafter.

The accomplice witnesses who testified against Mr. Reid faced similar sentences but for their cooperation deals with the government. All had brandished—and in one case, fired—firearms during robberies. One of the cooperating witnesses had done so on more than a dozen occasions. Yet, in exchange for the witnesses' cooperation, the

[1] Although Mr. Chaney pleaded guilty, he did not testify at Mr. Reid's trial.

government declined to charge any of them with a single count of violating Section 924(c).

In cross-examining these witnesses, defense counsel sought to explore the benefits that those witnesses had received in exchange for their testimony. And although the trial court permitted defense counsel to cross-examine the cooperating witnesses about the government's decision not to charge any of them with a violation of Section 924(c), the court prevented defense counsel from eliciting the mandatory five, seven, ten, and twenty-five year consecutive sentences that those witnesses had avoided as a result. The court reasoned that allowing such questioning would have resulted in the jury learning the sentence faced by Mr. Reid.

On July 27, 2007, the jury found Mr. Reid guilty of eleven counts of the fifteen-count indictment: one count of Hobbs Act conspiracy, five of the seven Hobbs Act robbery counts, and five of the seven counts of using a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). (A12, A14.)[2] The jury acquitted Mr. Reid of two substantive Hobbs Act robbery counts and two corresponding Section 924(c) counts.

B. Post-Trial Motions and 119-Year Sentence

Mr. Reid moved for a judgment of acquittal and/or a new trial based in part on the district court's refusal to permit the defense to elicit the mandatory minimum sentences that the

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[2] "A__" denotes citations to the Appendix to this Petition.

co-conspirators faced had they not cooperated with the government, as well as the unconstitutionality of the government's decision to charge Mr. Reid with seven separate counts of violating Section 924(c). All of Mr. Reid's post-trial motions were denied in a ruling from the bench at Mr. Reid's sentencing. (A30-42.)

Mr. Reid was sentenced to 150 months' imprisonment pursuant to the Sentencing Guidelines. (A55.) As a result of his five counts of conviction pursuant to Section 924(c), the district court sentenced Mr. Reid to an additional 107 years' consecutive imprisonment, for a total prison term of approximately 119 years. (A56.)

In stark contrast, Mr. Reid's co-defendant, Sean Chaney, who pleaded guilty pursuant to a plea agreement to Hobbs Act robbery conspiracy, one count of Hobbs Act robbery, and one count of violating Section 924(c), was sentenced to less than 14 years in prison. (A82.)

The criminal conduct of Mr. Chaney and the government's accomplice witnesses was markedly worse than the conduct attributed to Mr. Reid. As was discussed at Mr. Chaney's sentencing hearing, Mr. Chaney, unlike Mr. Reid, personally participated in every robbery with which he was charged, repeatedly fired gunshots at a victim of one robbery, hit another victim in the face with a gun, and was captured on videotape physically striking other victims during robberies. (A74.) Nevertheless, and despite having committed the same crimes, Mr. Chaney was sentenced to a prison term that is *100 years shorter* than that received by Mr. Reid by

simple virtue of Mr. Reid's exercising his right to trial.

The accomplice witnesses who testified against Mr. Reid received even more disparate sentences: one served just over four years' imprisonment; one received a sentence of one day in prison; and one received a grant of immunity and was not prosecuted at all.

Mr. Reid's conviction and sentence were affirmed by the United States Court of Appeals for the Second Circuit on November 12, 2008. (A60.)

C. Jurisdiction Below

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant this Petition to Resolve the Circuit Split between the Third and Ninth Circuits on the One Hand, and the First, Second, and Fourth Circuits on the Other, Concerning Whether the Confrontation Clause Guarantees a Defendant's Right to Cross-Examine an Accomplice Witness about the Mandatory Minimum Sentences the Witness Avoided by Cooperating with the Government Even Where Such Cross-Examination May Alert the Jury to the Mandatory Minimum Sentences Faced by the Defendant.

When a co-conspirator testifies as a witness for the prosecution, the witness's motivation to testify is "a proper and important function of the constitutionally protected right of cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). The potential sentence that such a witness sought to avoid—here, a mandatory *minimum* of life in prison had the witnesses been charged with and convicted of the multiple Section 924(c) violations of which they were, by their own admission, guilty—goes directly to the heart of the witness's motivation for testifying—that is, to the witness's bias.

A. The Courts of Appeals are Divided with Respect to this Issue.

The federal circuits are deeply divided on the issue of whether a defendant's Confrontation Clause rights are violated when a court bars the cross-examination of an accomplice witness about the mandatory minimum sentence that the witness avoided by cooperating with the government in order to keep the jury from learning that the defendant faced a similar mandatory minimum sentence. *Compare United States* v. *Larson*, 495 F.3d 1094, 1102-07 (9th Cir. 2007) (en banc) (finding a constitutional violation), *and United States* v. *Chandler*, 326 F.3d 210, 219-22 (3d Cir. 2003) (same), *with United States* v. *Reid*, No. 08-0134-cr (2d Cir. Nov. 12, 2008)[3] (no constitutional violation), *United States* v. *Cropp*, 127 F.3d 354, 358-59 (4th Cir. 1997) (same), *and United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995) (same).[4]

The Court should grant this Petition to resolve this important split and clarify that a defendant's ability to exercise fully his Sixth Amendment Confrontation Clause rights outweigh a court's concern that a jury's verdict may be influenced by the knowledge of the defendant's potential punishment.

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[3] A61-62.

[4] The Delaware Supreme Court has also addressed this issue and agreed with the Third and Ninth Circuits. *See Wilson* v. *State*, 950 A.2d 634, 639-40 (Del. 2008).

The reasoning of the courts of appeals that have so found is persuasive. For example, in *Larson*, four defendants were indicted together for violating 21 U.S.C. §§ 841(a)(1) and 846 and faced mandatory minimum sentences. Two defendants pleaded guilty pursuant to cooperation agreements requiring them to testify against their co-defendants in exchange for a motion for a reduced sentence and to allow the court to sentence them below the applicable statutory minimum. *Larson*, 495 F.3d at 1097.

At trial, both witnesses testified that they cooperated with the expectation that the government would move to reduce their sentences and acknowledged that only the government could do so. Defense counsel was able to elicit that one of the accomplice witnesses faced a five-year mandatory minimum sentence absent a motion by the government, but the district court immediately barred further questioning on that issue and informed the jury that "all matters related to sentencing are the decision of the court and the court only." *Id.* at 1098. Defense counsel was not permitted to elicit from the second accomplice witness the mandatory minimum life sentence he faced in accordance with the court's prior ruling. *Id.* at 1104 & n.8. Both defendants were convicted. On appeal, a three-judge panel affirmed, finding no constitutional violation; on *en banc* rehearing, however, the Ninth Circuit disagreed.[5]

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[5] Although the court *en banc* found a constitutional violation for the reasons set forth below, a majority of the court ultimately concluded that the error was harmless in view of the strength of the evidence and declined to reverse the defendants' *(footnote continued)*

The *en banc* court held that barring cross-examination concerning the mandatory minimum sentence of the second accomplice witness violated the defendants' Confrontation Clause rights. The court recognized that "[a] cooperating witness who faces a statutorily mandated sentence of life in prison unless the government moves for reduction of the sentence has a compelling incentive to testify to the government's satisfaction." *Id.* at 1104. As such, "the mandatory nature of the potential sentence, the length of the sentence, and the witness' obvious motivation to avoid such a sentence cast considerable doubt on the believability of the witness' testimony." *Id.* With respect to the first accomplice witness who testified, however, the court found no constitutional violation because the district court did not strike her acknowledgement that she faced a five-year mandatory minimum sentence. *Id.* at 1103-04.

The court acknowledged the government's concern that allowing cross-examination of the second accomplice witness would have enabled the jury to infer that the defendants faced mandatory minimum sentences, which might have influenced the jury's verdict.[6] But the court held that the "right

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(footnote continued)
convictions. *Larson*, 495 F.3d at 1108. Notably, however, four judges dissented from that aspect of the majority opinion and would have reversed on the ground that the constitutional error was not harmless. *Id.* at 1113-14 (Hawkins, J., dissenting).

[6] Although the district court does not appear to have identified a concern that the jury would learn of the defendant's sentence as a basis for the court's limitation of cross-examination, the decisions of both the panel and the *en banc* court understood the district court's ruling to have been based in part on the risk
(footnote continued)

to explore the bias of a cooperating witness who is facing a mandatory life sentence" outweighed such concerns. *Id.* at 1105. The court also emphasized that "[t]he potential maximum statutory sentence that a cooperating witness *might* receive . . . is fundamentally different from the *mandatory* minimum sentence that the witness *will* receive in the absence of a motion by the Government." *Id.* at 1106. The court explained:

> The former lacks significant probative force because a defendant seldom receives the maximum penalty permissible under the statute of conviction. In contrast, the fact that here a cooperating witness faced a mandatory life sentence without the possibility of release in the absence of a government motion is highly relevant to the witness' credibility. It is a sentence that the witness knows *with certainty* that he will receive unless he satisfies the government with substantial and meaningful cooperation so that it will move to reduce his sentence.

Id. at 1106 (footnote omitted).

In reaching its holding, the Ninth Circuit found persuasive an earlier decision by the Third

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(footnote continued)
that the jury would infer the penalties faced by the defendant and consider the potential sentence in its verdict. *See Larson*, 495 F.3d at 1105; *United States* v. *Larson*, 460 F.3d 1200, 1207 (9th Cir. 2006).

Circuit Court of Appeals in *Chandler*. There, two accomplice witnesses testified for the government in the hope of avoiding long mandatory sentences. In return, "the government limited the charges against [one of the cooperating witnesses] to those associated with [a] three-ounce cocaine sale"—despite his admission to having dealt "about five kilos"—and also moved to reduce his sentence for the three-ounce sale. *Chandler*, 326 F.3d at 216-17. He was sentenced to one month of house arrest.

At trial, the accomplice witness testified that he had been facing 12 to 18 months in prison (the potential sentence for the three-ounce sale), but instead received a sentence of one month of house arrest. On cross-examination, the court prevented defense counsel from eliciting the eight-year mandatory minimum sentence the accomplice witness would have faced had he been charged with dealing five kilograms of cocaine. The witness admitted to dealing the larger amount and acknowledged that "the more you sell, the more penalty," but the jury never learned the extent of the increase. *Id.* at 217.

The Third Circuit reversed the defendant's conviction, holding that her Confrontation Clause rights were violated by the court's barring cross-examination about "the *magnitude* of the sentence reduction they believed they had earned, or would earn, through their testimony" because "the jury might have 'received a significantly different impression of [their] credibility.'" *Id.* at 221 (quoting *Van Arsdall*, 475 U.S. at 680 (alteration in original)). The court explained that the jury had no reason to infer from the witness's testimony that his

cooperation "might have meant the difference between more than eight years in prison, on the one hand, and the modest sentence he in fact received, on the other." *Id.* at 222. His general acknowledgment of a benefit from his cooperation was "insufficient for a jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution." *Id.*

Like the Ninth Circuit, the Third Circuit in *Chandler* recognized that the government "had a valid interest in keeping from the jury information from which it might infer [the defendant's] prospective sentence were she to be convicted," but held that this interest "had to yield to [the defendant's] constitutional right to probe the 'possible biases, prejudices, or ulterior motives of the witnesses' against her." *Id.* at 223 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974)).

By contrast, the First and Fourth Circuits—and now the Second Circuit in the decision below for which this Petition seeks review—have incorrectly upheld a district court's limitation on cross-examination of accomplice witnesses about the mandatory sentences they avoided by cooperating to keep the jury from learning that the defendant faced a similar mandatory minimum sentence. The Fourth Circuit has held that "[a] district court's concern that the jury might 'nullify' its verdict if it knew the extreme penalties" faced by the defendants justified barring cross-examination of the accomplice witnesses about the statutory mandatory minimum sentences they would have faced had they not cooperated with the government. *Cropp*, 127 F.3d at 358. Likewise, the First Circuit has held that "the

potential for prejudice by having the jury learn what penalties the defendants were facing" justified limiting cross-examination of an accomplice witness about the mandatory minimum sentence he avoided. *Luciano-Mosquera*, 63 F.3d at 1153.

The reasoning of the Second Circuit in this case was the same. (A61-62.) As discussed below, those decisions were in error. Given the prevalence of statutory minimum sentences in federal law, this issue is one that arises repeatedly in criminal prosecutions[7]; this Court should grant this Petition to resolve the question and make clear that the decisions of the Third and Ninth Circuits should control the determination of this issue.

B. The Court Should Resolve the Circuit Split According to the Practices that Existed in 1791 when the Sixth Amendment was Adopted.

This Court has repeatedly explained that the Sixth Amendment rights of confrontation and trial by jury must be interpreted in light of the practices that existed in 1791 when the Sixth Amendment was adopted. To interpret the Confrontation Clause, this Court has often "turn[ed] to the historical background of the Clause to understand its meaning." *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004); *see also Davis* v. *Washington*, 547 U.S. 813,

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[7] *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34 (2003) ("Over the past few decades, the federal government and many states have embraced mandatory minimum sentences and binding sentencing guidelines.").

822 n.1, 824 (2006) (relying on early American cases and evidence of the Framers' intentions to determine the scope of the Confrontation Clause).

Likewise, *Apprendi* and its progeny made clear that the determination of whether sentencing law conflicts with the Sixth Amendment right to a jury trial depends heavily on common-law practices that existed in 1791 when the Sixth Amendment was adopted. *See Blakely* v. *Washington*, 542 U.S. 296, 313 (2004) (relying on "the Framers' paradigm for criminal justice" to invalidate state sentencing law under the Sixth Amendment); *Ring* v. *Arizona*, 536 U.S. 584, 599 (2002) (considering an Arizona law's constitutionality as "[i]f th[e] question had been posed in 1791, when the Sixth Amendment became law" (second alteration in original; quotation marks omitted)); *Apprendi* v. *New Jersey*, 530 U.S. 466, 476-81 (2000) (relying on criminal procedure "as it existed during the years surrounding our Nation's founding"); *see also United States* v. *Booker*, 543 U.S. 220, 238 (2004) (explaining that *Blakely* and *Apprendi* were "not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law").

Surprisingly, none of the courts of appeals that have addressed this question made any mention of this history in their analysis. But this Court's jurisprudence makes clear that the critical question here is whether a court trying Mr. Reid in 1791 could have barred him from confronting accomplice witnesses about the mandatory minimum sentences that applied to them absent cooperation out of concern that the jury might learn that Mr. Reid faced

similar mandatory minimum sentences. The answer is plainly no.

C. In 1791, a Defendant Had a Right to a Jury that Knew the Criminal Penalties the Defendant was Facing.

Jurors in eighteenth-century England were generally familiar with the sentencing consequences of a guilty verdict.[8] In fact, judges in England often specifically informed juries about such sentencing consequences so that they could be considered during the juries' deliberations. Professor John H. Langbein has highlighted as typical of this practice the 1754 London trial of a defendant charged with theft of a watch valued at 40 shillings and more than 20 guineas of cash. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 22 (1983). Notes written by the presiding judge in that case explain the jury's verdict: "The jury found him guilty to [the] value of 39s., which they did after I told them that 40s. was necessary to make him guilty of [a capital] felony." *Id.* (first alteration in original) (quotation marks omitted).[9] In fact, historical research shows that British juries at that time routinely engaged in

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[8] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 425 (1986) (noting that jurors in England "knew the [sentencing] options in all but the trickiest cases").

[9] The jury's verdict valuing the stolen property at 39 shillings is particularly telling because "20 guineas in money" was the equivalent of 400 shillings. There are many documented examples of such obvious reductions in valuation. *See* BEATTIE, *supra* note 8, at 424-25 (listing examples).

a practice of "downvaluing" stolen goods to mitigate the harsh statutory mandatory sentence for, in this case, thefts from a dwelling house of property valued over 40 shillings. "The recurrent verdicts of . . . thirty-nine shillings in Old Bailey trials are telltale signs of this process." *Id.* at 41; *see also* WILLIAM BLACKSTONE, 4 COMMENTARIES *239 ("[T]he mercy of juries wil often make them strain a point, and bring in larciny to be under the value of twelve pence when it is really of much greater value.").

As this Court has recognized, jurors in the colonies, too, were familiar with criminal sentences and routinely "devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant." *Apprendi*, 530 U.S. at 479 n.5.

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution . . . endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.

Jones v. *United States*, 526 U.S. 227, 245 (1999). Such manifestations illustrate "one of the most important aspects of the jury's prerogative—the power to effect a mitigation in the severity of the law by verdicts which would let off an obvious offender with penalties less than the worst of the charges against him would make inevitable." JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 673-74 (1944).

Juries continued to exercise this power during the decades after the Sixth Amendment was adopted. *Id.* at 675. For example, an 1815 decision of South Carolina's highest law court addressed whether the jury could find a defendant guilty of petit larceny when the property stolen was proved to be of greater value than qualified for that offense. The court's decision was unequivocal: "[I]t is what Judge Blackstone calls a pious perjury, which they have been indulged in until it has become the law of the land. The principle has been too long established to be now called in question." *State* v. *Bennet*, 5 S.C.L. (3 Brev.) 515 (S.C. Const. App. 1815); *see also People* v. *M'Fall*, 1 Wheeler Crim. Cases 107, 111 (N.Y. City Hall Dec. 1822) (listing three examples in New York among "a host of others").[10]

Colonial and early American juries were able to exercise their power to check governmental

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[10] Although the historical record strongly supports the conclusion that a defendant should have a Sixth Amendment right to inform the jury of any mandatory minimum sentence, this Petition does not seek a writ of certiorari on this issue, and a reversal of the Petitioner's conviction does not require such a conclusion. *See infra* Part E.

authority because the jurors, like their English counterparts, were familiar with the punishments imposed by local criminal law.[11] Fixed sentences were the norm. *Jones*, 526 U.S. at 244. "In the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment." *United States* v. *Grayson*, 438 U.S. 41, 45 (1978). Jurors, therefore, knew the sentence that was directly dictated by their verdict. Barkow, *supra* note 7, at 70-71.

Thus, the historical record demonstrates that, had Mr. Reid been tried in 1791, his jury would have known the criminal penalties of the crimes with which he was charged. Per force, the court could not have barred him from confronting accomplice witnesses about the mandatory minimum sentences that they themselves had avoided by cooperating with the prosecution because of a fear that the jury would learn of the potential criminal penalties faced by Mr. Reid.

D. Preventing the Jury from Learning of the Defendant's Applicable Mandatory

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[11] *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 32 (1994) (noting that jurors were sufficiently knowledgeable that they "did not . . . need to rely on a judge's instructions"); 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Roth & Hiller B. Zobel eds., 1965) (noting that "the general Rules of Law and common Regulations of Society . . . are well enough known to ordinary Jurors").

Minimum Sentences Does Not Justify Curtailing a Defendant's Sixth Amendment Right to Confront an Accomplice Witness about the Sentence the Witness Avoided.

The Founders would have viewed the barring of a defendant's right to cross-examine an accomplice witness about his motivation for testifying to be an improper interference with both a defendant's constitutional rights and the jury's power to check governmental authority.[12] At the 1603 trial of Sir Walter Raleigh for treason, Raleigh sought to confront Lord Cobham, an alleged accomplice whose prior *ex parte* testimony against Raleigh was read to the jury. Raleigh demanded that the judges call Cobham to be confronted about his motivation for testifying against Raleigh: "Raleigh argued that Cobham had lied to save himself: 'Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour.'"

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[12] The importance to the Framers of the jury's role as a check on governmental authority can hardly be overstated. *See Blakely*, 542 U.S. at 308 ("[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."); THE FEDERALIST NO. 83 (Alexander Hamilton) (noting that federalists and anti-federalists "concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government"); LETTER XV FROM THE FEDERAL FARMER (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981) (noting that the jury "secure[s] to the people at large[] their just and rightful controul in the judicial department").

Crawford, 541 U.S. at 44 (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 435 (1832)). The judges refused to call Cobham, and Raleigh was convicted and sentenced to death. *Id.*

Raleigh's trial, which gave rise to reforms in England that ultimately led to the inclusion of the Confrontation Clause in the Sixth Amendment, *id.* at 44-50, demonstrates that a core right guaranteed by the Confrontation Clause is the right to confront a cooperating witness about his motivations for testifying. A court trying Mr. Reid contemporaneously with the Sixth Amendment's adoption would not have barred Mr. Reid from cross-examining the accomplice witnesses about the mandatory minimum sentence they avoided by cooperating.

In later decades, the rise of discretionary sentencing has diminished the jury's ability to affect a defendant's sentence as a check on governmental authority. "In the nineteenth and most of the twentieth centuries, discretionary sentencing became the norm, and judges and correctional personnel were given broad leeway to determine prison sentences." Barkow, *supra* note 7, at 71. And notwithstanding *Apprendi*, juries play no role now in calculating or applying the Sentencing Guidelines. The result is a complex sentencing system that requires "tomes of highly abstruse, convoluted definitions and extraordinary combinations of statutory prison maximums and minimums, fines, restitutions, forfeitures, probationary terms, treatment for mental health and other problems in and out of prison, sentencing guidelines, caselaw and

local practice." *United States* v. *Polizzi*, 549 F. Supp. 2d 308, 407 (E.D.N.Y. 2008).

The increasing complexity of sentencing law, along with guidelines-based sentencing and judicial discretion over sentencing matters, have resulted in a "division of labor" between judge and jury in modern criminal courts: "The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict." *Shannon* v. *United States*, 512 U.S. 573, 579 (1994). As a result, courts today disfavor instructing juries about the sentencing consequences of their verdicts out of concern that doing so "invites them to ponder matters that are not within their province." *Id.*

Although discretionary sentencing has diminished the jury's power to check governmental authority as envisioned by the Founders, the judicial branch—outside the context of statutory minimum sentences—can fill that role, because judges are able "to adjust their rulings to the individual circumstances before them regardless of legislative or executive demands." Barkow, *supra* note 7, at 85. Thus, absent statutory minimum sentences, defendants receive a wide range of sentences that are individually tailored based on the Sentencing Guidelines and statutory factors over which the jury has no say. In such cases, keeping sentencing information from the jury is perhaps not inconsistent with the Founders' intent because the judicial branch as a whole still wields "broad power to ensure

equitable results in particular cases" as a check on the other branches. *See id.* at 74.

But when statutory mandatory minimum sentences come into play, the power of the jury—and the court—to check legislative and executive authority is entirely abrogated. Like the fixed sentences that were the norm when the Sixth Amendment was adopted, today's minimum sentences mandated by statute mean that the jury's verdict necessarily dictates the defendant's sentence. But unlike in 1791, modern juries are unaware that their verdict will require the court to impose a mandatory minimum sentence. In such cases, it hardly makes sense—and in fact misleads the jury—for the court to instruct the jury, as it did in *Larson*, that the jury's role is to decide only the question of guilt or innocence while leaving to the court the determination of the appropriate punishment. In truth, the court is as powerless as the jury on that score—the prosecutors alone make that determination. *See Larson*, 495 F.3d at 1104 (explaining that such instructions are inaccurate in the context of mandatory minimum sentences because "in the absence of a motion by the Government, the court would be *required* to sentence [the accomplice witnesses] to the statutory minimum sentences for the offenses to which they pled guilty").

E. The Question Presented for Review in this Petition is More Limited than the Holding in *United States* v. *Polizzi*.

In *United States* v. *Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. 2008), the court held that a defendant that faces a statutory mandatory minimum sentence

has a Sixth Amendment right to inform the jury of that fact. The defendant there was convicted of twelve counts of receiving child pornography and eleven counts of possessing child pornography. The jury was not informed that a conviction for receipt carries a statutory mandatory minimum sentence of five years in prison despite the defendant's request for such an instruction. *Polizzi*, 549 F. Supp. 2d at 320.

On the defendant's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, the court held, in a thorough and lengthy opinion based on this Court's recent Sixth Amendment jurisprudence, that the defendant had a constitutional right to inform the jury of the mandatory minimum sentence that he faced:

> [T]he emphasis on originalism by the Supreme Court in sentencing and confrontation requires enforcement of a basic element of the Sixth Amendment as originally understood: the jury of the vicinage, being aware of the sentencing implications of a finding of guilt, had the frequently exercised power to refuse to follow the law as construed by the court, and could acquit or downgrade the crime in order to avoid a sentence it deemed excessive.
>
> The complexity of modern . . . criminal law and the general public's lack of detailed knowledge of federal statutory provisions require that, in the few cases where necessary, the jury be informed

> of such matters as the required minimum term of incarceration that will follow from its verdict so that it can exercise its constitutionally mandated historic role.

Id. at 322.[13]

The Petitioner here does not seek a writ of certiorari on the issue addressed in *Polizzi*: of whether a defendant facing a statutory mandatory minimum sentence has a Sixth Amendment right to have the jury informed of that fact. Rather, this Petition presents the question whether such information about mandatory minimum sentencing can be kept from the jury if doing so infringes on the defendant's right to confront a witness about the mandatory minimum sentence the witness avoided by cooperating with the prosecution.

For the reasons explained above and in the decisions of the Third and Ninth Circuits, exploring a witness's motivation to testify is critical to the jury's ability to assess the witness's credibility. Here, at least two of the accomplice witnesses faced multiple charges pursuant to 18 U.S.C. § 924(c)—in effect, life sentences—which they bargained away as part of their cooperation agreements. Mr. Reid was not

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[13] *Polizzi* limited its holding "to that small group of cases where the jury would not be expected to know of the applicable harsh mandatory minimum." 549 F. Supp. 2d at 323. Both the defendant and the government have appealed the *Polizzi* decision. The United States Court of Appeals for the Second Circuit held oral argument on January 9, 2009, and a decision in that case is pending.

permitted to confront them on that point or argue that that incentive rendered their testimony suspect, all because the district court feared that the jury would learn Mr. Reid's potential punishment. The Court should grant this Petition to resolve the split in the courts of appeals on this question and clarify that such restrictions on a defendant's core constitutional confrontation rights cannot be countenanced.

II. The Court Should Grant the Petition to Clarify that *Mistretta* and *Booker* Prevent Charging Decisions by the Government that Result in Vastly Different Sentences for Otherwise Similarly Situated Defendants and that Place Both the Power to Prosecute and the Power to Sentence in the Hands of the Executive Branch.

Although prosecutorial charging decisions deserve great deference, those decisions must conform to the constitutional requirements of due process and the separation of powers doctrine. As this Court has stated, "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978). When that discretion is coupled with the power to charge multiple counts of a federal crime carrying a lengthy mandatory minimum sentence, such as 18 U.S.C. § 924(c), the risk of abuse is far greater: the prosecutor, entirely on his own, determines that, if convicted, the defendant will be sentenced to die in prison. This uniting of the power

to prosecute and the power to sentence within the Executive Branch unconstitutionally violates the doctrine of separation of powers.

Whatever wisdom there may be to a system whereby prosecutors have unfettered discretion to charge defendants with however many violations of Section 924(c) they choose, there are significant problems with its application generally and in this case. First, uniting both the power to prosecute and the power to sentence within the Executive Branch violates the separation of powers doctrine. Second, as a result, equally culpable defendants receive grossly asymmetrical sentences based purely on prosecutorial discretion. Third, those asymmetrical sentences that emerge "reflect real conduct" less completely and less accurately than a system where judges have the "power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment." *United States* v. *Booker*, 543 U.S. 220, 256-57 (2005).

Courts across the nation have spoken out against the astoundingly unfair sentences that they are forced to impose simply because a prosecutor chose to charge a defendant with multiple Section 924(c) charges. The guidance of this Court is necessary to clarify that *Mistretta* and *Booker* do not permit charging decisions that result in starkly different sentences for otherwise similarly situated defendants and effectively usurp the power granted to judges by the Sentencing Act by placing it in the hands of the Executive Branch.

A. The Application of Section 924(c) to Mr. Reid Impermissibly United the Power to

Prosecute and the Power to Sentence within the Executive Branch and Usurped the Sentencing Power from the Court.

Mr. Reid was sentenced to approximately 119 years' imprisonment, of which the vast majority—107 years—resulted from his five Section 924(c) convictions. Because of the mandatory minimum sentences prescribed under Section 924(c), the prosecutors' decision to charge seven separate violations resulted in the imposition of this mandatory life sentence and left the judge powerless to mitigate the unconscionable result. The government thus exercised what should have been the district court's power in sentencing Mr. Reid.[14] This uniting of the power to prosecute and the power to sentence within the Executive branch creates "particularly troubling consequences with respect to prosecutorial power"—precisely what this Court worked to avoid in *Booker*, 543 U.S. at 256.

This Court has twice expressed its concern about vesting the Executive Branch with sentencing discretion. *See Mistretta* v. *United States*, 488 U.S.

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[14] The Petitioner does not dispute that Congress has the authority to deprive the courts of sentencing discretion by creating mandatory minimum sentences. *See United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Nor does the Petitioner argue that *Booker*'s holding renders the penalty provisions of Section 924(c) advisory. Rather, the question presented here is whether prosecutors' unreasonable decision to stack multiple Section 924(c) charges against one defendant, thus mandating a life sentence, violates the separation of powers doctrine by uniting both the power to prosecute and the power to sentence within one branch, and whether doing so violates the defendant's due process rights.

361 (1989); *Booker*, 543 U.S. 220. In *Mistretta*, the Court held that the Sentencing Guidelines did not violate the separation of powers doctrine because Congress had vested the Guidelines rulemaking function in the Judicial, rather than the Executive, Branch. 488 U.S. at 390-92. Had Congress done otherwise, the Court suggested, a different result would have been required:

> Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibility to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch.

Id. at 391 n.17.

More recently, in *Booker*, this Court warned that a system under which "prosecutors . . . exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment," is unwise and, indeed, unconstitutional. 543 U.S. at 257. In *Booker*, this Court chose to invalidate the mandatory operation of the Sentencing Guidelines rather than impose a Sixth Amendment constitutional requirement to prove each Guidelines enhancement to a jury based, in part, on this very concern:

> [I]n a sentencing system with the Court's constitutional requirement

> engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely. . . . It is the prosecutor who, through such a charging decision, would control the sentencing range.

Id. at 256-57. The Court concluded that such a regime would be impermissible. *Id.*

Yet this is precisely the regime under which Mr. Reid was charged and sentenced. The prosecutors, acting alone and without any checks from the judiciary, ensured that Mr. Reid would die in prison by stacking multiple Section 924(c) charges against him. Allowing Mr. Reid's sentence to remain intact thus runs afoul of this Court's guidance, as it "unite[s] the power to prosecute and the power to sentence within [the Executive] Branch," *Mistretta*, 488 U.S. at 391 n.17, thereby granting prosecutors "a power the Sentencing Act vested in judges," *Booker*, 543 U.S. at 257. Further, it defies Congress' "'strong feeling' that sentencing has been and should remain 'primarily a judicial function.'" *Mistretta*, 488 U.S. at 390 (quoting S. REP. NO. 98-225, at 159 (1983)). This Court should grant certiorari because, as *Mistretta* and *Booker* make clear, the Constitution does not permit such accretion of judicial authority by the Executive Branch.

(1) The Uniting of the Power to Prosecute and the Power to Sentence within the Executive Branch Resulted Here in Markedly Asymmetrical Sentences that are Not

Based on the "Real Conduct" of the Alleged Offenders.

Mr. Reid, his co-defendant, Mr. Chaney, and three accomplice witnesses were alleged to have participated in the same robbery conspiracy. Mr. Reid was sentenced to approximately 119 years in prison. Mr. Chaney was sentenced to less than 14 years in prison. The three accomplice witnesses received federal sentences, respectively, of just over four years' imprisonment, one day in prison, and no prison sentence at all.

In each case, the government—and not the court—largely determined the sentence that the offender received through the decision to charge, or not to charge, violations of Section 924(c). Mr. Chaney was sentenced pursuant to his plea agreement; two accomplice witnesses were sentenced pursuant to their respective cooperation agreements; and the third accomplice witness was granted immunity in exchange for his testimony. By contrast, Mr. Reid received a life sentence because of the government's unilateral decision to charge him with multiple Section 924(c) violations. The district court believed that it was powerless to impose a lesser sentence. This unjust result runs afoul of recent constitutional jurisprudence from this Court.

In *Booker*, the Court stressed the importance of having similarly situated defendants receive similar sentences and emphasized the significance of having those sentences relate to the "real conduct" of each defendant. 543 U.S. at 251. The Court specifically noted that that determination was "important even in respect to ordinary crimes, such

as robbery, where an act that meets the statutory definition can be committed in a host of different ways." *Id.* at 251. Indeed, the Court provided hypothetical examples illustrating the inequitable results that can occur when the nexus between an offender's real conduct and sentence is lacking. *Id.* at 252-53. Mr. Reid's case provides a real-life example of those precise concerns.

Comparing the real conduct of Mr. Reid, Mr. Chaney, and the accomplice witnesses exemplifies the illogic in this case. It is undisputed that Mr. Reid was not present, nor possessed a firearm, at four of the five robberies for which he was convicted. Mr. Chaney, in contrast, was implicated in several additional robberies with which Mr. Reid was not charged and personally participated in every robbery with which he was charged. Moreover, he repeatedly fired gunshots at a victim of one robbery, hit another victim in the face with a gun, and was captured on videotape physically striking other victims during robberies. Likewise, the accomplice witnesses who testified against Mr. Reid all had brandished—and in one case, fired—firearms during robberies. One of the cooperating witnesses had done so on more than a dozen occasions.

Just as in the examples given in *Booker*, Mr. Reid's, Mr. Chaney's, and the accomplice witnesses' behavior was strikingly different; the harmful consequences of their actions were different; and their punishments should accordingly also have been different. Certainly, there was nothing about Mr. Reid's conduct that merited a sentence *one hundred years longer* than that received by his co-conspirators.

To be sure, there should be a difference between defendants who plead guilty or cooperate with the government and those who choose to go to trial. But to punish a defendant with an additional 100 years in prison simply because he chose to exercise his constitutional right to trial cannot be justified. Moreover, the practice of over-charging a defendant with multiple Section 924(c) charges in order to induce a guilty plea will, as here, create perverse results: the severest penalty under Section 924(c) will not be meted "on flagrantly guilty repeat offenders (who avoid the mandatory sentence by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial)." Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 203 (1993).[15]

As this Court explained in *Booker*, ensuring that there is a rational relationship between the sentence imposed and the defendant's actual conduct "is critically important." 543 U.S. at 253.

> Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar

[15] While Mr. Reid does not assert that he is a first-time offender, the factual situation was "borderline" in that there was no physical or eyewitness evidence that connected him to any of the charged robberies, save one. Mr. Reid's connection to the robbery scheme was based almost entirely on the testimony of the government's cooperating witnesses.

> sentences for those convicted of violations of the same statute . . . . It consists more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance.

Id. at 253-54 (citations omitted).

The holding of *Booker* was, at least in part, based on the concern that grafting onto the Sentencing Act a jury trial requirement would result in a system wherein "the relation between the sentence and what actually occurred is likely to be considerably more distant . . . than it was even prior to the Sentencing Act." *Id.* at 253. In this case, the same perverse result was reached: unless his conviction is vacated, Mr. Reid, the participant in the alleged robbery conspiracy with the least direct involvement, will die in prison while the people who committed the actual robberies and threatened, beat, and shot at the victims receive leniency. This Court should grant certiorari because allowing the government unilaterally to impose a life sentence on a defendant, where that sentence bears little, if any, relation to the defendant's real conduct, violates the separation of powers doctrine and the defendant's Fifth Amendment right to due process.

(2) The Government's Charging Decision Violated Department of Justice Policy.

The arbitrariness and illogic of the government's charging decisions in this case is further highlighted by the fact that those decisions violated the Department of Justice's own internal

charging guidelines. The Department has attempted to curb these types of charging decisions and avoid the remarkable sentencing disparities that can—and in this case, did—occur among similarly situated defendants. To that end, in September 2003, the Department prescribed that no matter how many readily provable violations of Section 924(c) a defendant may have committed, prosecutors ordinarily may not charge more than two such violations absent exceptional circumstances:

> (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued. (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations.

Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, *Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges and Sentencing* (Sept. 22, 2003), *reprinted in* 16 FED. SENT'G REP. 129 (Dec. 2003) [hereinafter Ashcroft Memorandum] (A88); *United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1253-54 (D. Utah 2004) (interpreting the Ashcroft Memorandum as directing prosecutors to charge a maximum of two Section 924(c) offenses in all but exceptional circumstances).

As the Ashcroft Memorandum states: "Just as the sentence a defendant receives should not depend

upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case." Unfortunately for Mr. Reid, the charges he faced and the life sentence he received depended entirely on the particular prosecutors assigned to his case—prosecutors who ignored the government's internal policy and charged Mr. Reid with seven Section 924(c) offenses, ensuring, if he was convicted, that the then-27-year-old defendant would die in prison. Although internal Department guidelines confer no substantive or procedural rights on defendants, the choice by the government in this case to ignore the Department's policy underscores both the disparity heaped on Mr. Reid in this case and the unjust result that can occur when both the power to prosecute and sentence are united within the Executive Branch with no oversight from the Judiciary.

B. Judges and Commentators Have Recognized the Extraordinarily Unfair Sentences Imposed When Prosecutors are Allowed Unfettered Discretion to Charge as Many Section 924(c) Counts as They Choose.

In most cases, defendants are not charged with more than two Section 924(c) violations. *See* Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1679-81 (2002). Indeed, as prescribed by the Ashcroft Memorandum, the majority of defendants are charged with two or fewer Section 924(c) violations. But in the few cases where the government has stacked three or more counts of

Section 924(c) violations in one indictment, judges across the nation have expressed their outrage with the absurdity of the sentences that they were forced to impose. *See United States* v. *Ciszkowski*, 430 F. Supp. 2d 1283 (M.D. Fla. 2006); *Angelos*, 345 F. Supp. 2d 1227; *United States* v. *Ezell*, 417 F. Supp. 2d 667 (E.D. Pa. 2006). As the district judge in *Angelos* noted, when prosecutors stack multiple Section 924(c) charges against a defendant, the resulting mandatory sentences are often outside of "the realm of reason." 345 F. Supp. 2d at 1261.[16]

Indeed, at Mr. Reid's sentencing hearing, the district judge commented on the extraordinary length of Mr. Reid's sentence and explained how the prosecutor's charging decision put her in a "very difficult . . . position":

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[16] Commentators, too, have questioned the fairness of a scheme that allows prosecutors unfettered discretion.

> Because the super-enhanced penalties under § 924(c) are so severe, th[e] expansion of the prosecutors' discretion has two consequences: it increases the prosecution's leverage to compel defendants to plead guilty to predicate offenses, and it allows prosecutors to determine which defendants will receive sentences enhanced under § 924(c) and which defendants' sentences will not . . . . [T]he effect of enhancing the penalties applicable to gun-related crime has been to enlarge greatly the scope of the discretion exercised by federal prosecutors and the magnitude of the consequences controlled by their discretion, without the development of any additional checks against the abuse of this enhanced discretion.

Beale, *supra*, at 1679-81.

> Well, let me say obviously I have to agree with defense counsel that I have never imposed a sentence anywhere near this or seen a situation like this; and it makes it very difficult to be in my position. Having said that, unless I am wrong about the law, I don't really think I have many choices.

(A46.) As evidenced by the district judge's acceptance of Mr. Chaney's plea agreement, the court clearly felt that a prison sentence of 157 to 166 months adequately reflected the seriousness of Mr. Chaney's actual conduct—conduct that was, as described earlier, far worse than the conduct of Mr. Reid. To allow the prosecutors unilaterally to impose on Mr. Reid a sentence 100 years greater than that which the district court felt was reasonable defies reason, defies the holding of *Booker* and the guidance of *Mistretta*, and is unconstitutional.

This Court should grant certiorari in this case and make that clear.

CONCLUSION

For all the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Samuel W. Seymour
Counsel of Record
Nicolas Bourtin
Allison Caffarone
Lindsay M. Manning
David L. Breau
Thomas C. White
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Petitioner

February 10, 2009

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - -

ATTORNEY FOR DEFENDANT:

NICOLAS BOURTIN, ESQ.
SAMUEL SEYMOUR, ESQ.
125 Broad Street
New York, N.Y. 10004-2498
(212) 558-3156
(212) 558-3588

Court Reporter: ALLAN R. SHERMAN, CSR, RPR
225 Cadman Plaza East Rm 374
Brooklyn, New York 11201
Tel: (718) 260-2529
Fax: (718) 254-7237

Proceedings recorded by mechanical stenography, transcription by CAT.

THE COURT: I was going to address the in limine issue.

Do you want to wait for your client?

MR. SEYMOUR: I think he is here.

(Defendant now present)

THE COURT: I've now had at least three or four days to think about this. Let me ask defense counsel it seems for me that for me to keep it out I would need a commitment from the defense that there will be no argument by implication through cross-examination or during summation that seeks to impeach the witness' claim about the threat, the earlier threat that promoted what the government views as his perjurious testimony in any way based on his willingness to testify in this trial.

If you'll make that commitment then I will keep it out. You have a lot of arguments to make about why he testifying in this trial it doesn't have to relate to that.

MR. SEYMOUR: I agree with that, your Honor, but the, I believe the witness will testify that he gave false testimony historically the past testimony because of a threat at that time.

THE COURT: Right.

MR. SEYMOUR: And I certainly do intend to challenge that as not credible because --

THE COURT: You can challenge it as not credible but I don't want any suggestion before the jury that the fact that the witness is now testifying against the defendant for the government somehow undermines the truthfulness of that.

MR. SEYMOUR: We will argue that he is testifying now because it's an exchange for favorable treatment both community and parole.

THE COURT: Favorable treatment but not because -- he is not afraid of the defendant or whatever.

MR. WEISER: If they say he wasn't threatened before they are saying --

THE COURT: As far as I'm concerned, I'm going to trust them to not make that connection. They can't possibly not seek to impugn the fact of the threat. I just don't want it impugned based on the witness' willingness to testify against the defendant in this trial.

MR. WEISER: There is an obvious suggestion, if he was so scared that he couldn't testify before.

THE COURT: That's what I don't want them to argue or suggest and if they won't do it, then I'll keep it out.

MR. SEYMOUR: I think we can make the arguments we'd like to make as to the credibility of the assertion of the prior threat without addressing --

THE COURT: The fact of his testimony today.

MR. SEYMOUR: You have that commitment and I won't pursue that in cross-examination. I will be dealing with this witness today and Mr. Bourtin who will close will not make that argument.

MR. WEISER: If we believe that cross-examination unfairly impeaches.

THE COURT: If it goes over the line.

MR. SEYMOUR: We certainly intend to stay away from it.

THE COURT: That's why I'm saying, that --

MR. SEYMOUR: I know the jury is waiting.

Your Honor ruled earlier in the trial that in cross-examining accomplice witnesses, it's inappropriate to ask them about the failure of the government to charge them with 9249(c) violations.

We're going to have that issue again today where there is a witness who clearly could have been charged and instead was given immunity and --

THE COURT: I didn't say you couldn't cross-examine about the failure to charge 924(c). Indeed you did. Every accomplice has been cross-examined about that. I said I don't want before the jury the fact that there is a mandatory sentence that accompanies that.

MR. SEYMOUR: I'd like to revisit that. I believe it's not simply the matter of the failure to charge since the government has stressed on each redirect of the accomplices; loot at all the time you are facing and they actually parade out the actual steps. It's only fair to allow me to talk about the sentences that have not been charged because these are mandatory minimum sentences. There are very severe penalties that increase with each successive count. This is a huge -- it has a huge effect on the witness because of the failure, the avoidance --

THE COURT: I don't know that life plus 20 is very different from seven plus seven plus seven plus seven.

MR. SEYMOUR: It is because anything up to life is simply a sliding scale with no mandatory sentence in the middle. Each of these is a mandatory sentence that has to be consecutive as a matter of law. That is a very important fact and you can be certain that these witnesses are well aware of that either from the discussions with the government or their own counsel and I need to explore this.

THE COURT: I think that you've been sufficiently able to impugn their credibility based upon the advantages of their plea with the government going from life plus 20 going down to possibly nothing without adding the information about seven year counts and I think that goes directly to advising the jury of a mandatory sentence that I must impose upon your client if he is convicted.

MR. SEYMOUR: I am going to stray from this because I have your ruling but I will object. This is restraining our defense on a critical point because of the impact it would have on this jury if they understood that these witnesses are going to be given a deal that in some case is avoids 55 years of mandatory time.

THE COURT: I don't know why 55 years to this jury is going to be any different. Mandatory or non-mandatory.

MR. SEYMOUR: If it didn't make any difference, then they wouldn't use this weapon in some cases and not in others.

THE COURT: I think that all you are doing is advising the jury about my function with respect to your client should he be convicted. I don't think it really bears any further on the credibility of the witnesses and I think you have plenty of ammunition to do that without going into what the sentence of your client could possibly be.

MR. WEISER: With respect to this witness, just further, your Honor, he hasn't been charged at all with Hobbs Act robberies so he can be fairly impeached that he has not been charged with a crime. So why the need for -- you haven't been charged with this and you haven't been charged with that so you are not facing any additional time.

MR. SEYMOUR: Does this mean at this time I can't explore anything about penalties? I actually guess less leverage about exposure here. Do you see the logic of it?

THE COURT: You have already elicited from the 2 other accomplice witnesses that they are exposed to life plus 20. I don't know what more you need. So you say so you are not exposed to life plus 20.

MR. SEYMOUR: So I can discuss sentences to that extent?

THE COURT: To the extent that it's already out there. I just don't want it starting to focus on your client. I think that is inappropriate.

MR. WEISER: The only issue with saying life plus 20 for this witness is I think it unfairly suggests that that would be his sentence.

THE COURT: What is this witness' --

MR. WEISER: He is giving immunized testimony.

THE COURT: He is immunized but had he been charged, what would he have been charged with?

MR. WEISER: Just the Melissa Check Cashing and I'm not sure he could have been charged, we would have had to get petit charge approval from Washington, D.C.

THE COURT: Was he involved in crack?

MR. WEISER: We only know that from proffer protected statements so he actually could not have been charged with those crimes by us or otherwise. He didn't deal with Sean Chaney. We learned it in a proffer session. It's the reason we were frankly able to get immunity.

MR. SEYMOUR: For the government to say that they couldn't charge him with crack conspiracy because it was because it was in a proffer.

THE COURT: I know what he is saying. He is implicated in the crack.

MR. WEISER: By his own statements.

THE COURT: Even by his own statements.

MR. WEISER: We can't use his own statements. Why would he agree to sign a cooperation agreement? That is the point.

THE COURT: You could have prosecuted him.

MR. WEISER: Based on what evidence? We don't have any besides for his own statements.

THE COURT: Mr. Weiser, I do think my ruling about the 7 years count is correct but I'd like to give the defense as much leeway as I can honestly without distorting the truth. If he was involved in crack and the robberies, I think I would permit you the question are not subjected to whatever.

MR. WEISER: I wouldn't have a problem with it as long as it was specifically addressed crack cocaine dealing can carry that sentence.

THE COURT: You make the argument in summation. In other words, you have it out of two witnesses already. The argument is there. It's not that the jury hasn't heard it and if you just elicit from this witness that he is involved in crack and he is getting away with it, you can make the argument in summation not specifically about this witness but about the government witnesses generally that you've heard that government witnesses are exposed to life plus 20.

MR. SEYMOUR: With respect to that, we'd like to be able to say that all three of them were confronted with that. It's not good enough to say from our side of the table two out of three is enough.

THE COURT: You can just slide by it and say government witnesses are confronted with life plus 20. That subtilty is not going to be perceived by the jury. I want to give you what I can but I don't want to give you something that is untrue.

MR. SEYMOUR: We certainly don't want that either but life plus 20, if what we are talking about is factual accuracy, that underrepresents the exposure these people have. It would be a sentence of let's say 50 to life.

THE COURT: I'm sorry, but life is life.

MR. BOURTIN: It's a difference of 10 to life -- it's a difference of your Honor having discretion to sentence between 10 to life and your Honor having no discretion to sentence below -- it's actually not seven years, it's seven years for the first conviction, 25 years for every one after that. We are talking hundreds of years minimum.

THE COURT: I'm not going to go there because the only person who is there is your client. All it does is communicate to the jury what your client faces, which I'm sympathetic with, but is my problem.

AO245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
EASTERN District of NEW YORK

UNITED STATES OF AMERICA
V.
RODNEY REID

JUDGMENT IN A CRIMINAL CASE

Case Number:
CR-05-596(arr)

USM Number: 73546-053

SAMUEL W. SEYMOUR, ESQ.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☑ was found guilty on count(s) after a plea of not guilty. one through nine, 14 and 15 of the indictment.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1951(a)	HOBBS ACT CONSPIRACY.	12/13/2002	1
18 USC 1951(a)	HOBBS ACT ROBBERIES.	12/13/2002	2,4,6,8,14

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/18/2007
Date of Imposition of Judgment

s/ Judge Allyne R. Ross

Signature of Judge

ALLYNE R. ROSS U.S.D.J.

Name of Judge Title of Judge

12/28/2007

Date

DEFENDANT: RODNEY REID
CASE NUMBER: CR-05-596(arr)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 924(c)(1)(A)(i), 18 USC 924(c)(1)(A)(ii) 18 USC 924(c)(1)(A)(iii)	DISCHARGING A FIREARMS DURING A CRIME OF VIOLENCE.	12/13/2002	7
18 USC 924(c)(1)(A)(i) & 18 USC 924(c)(1)(A)(ii)	BRANDISHING A FIREARM DURING A CRIME OF VIOLENCE.	12/13/2002	3,5,9 & 15

DEFENDANT: RODNEY REID
CASE NUMBER: CR-05-596(arr)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

ONE THOUSAND FOUR HUNDRED AND THIRTY FOUR (1434) MONTHS.

**** PLEASE SEE FOLLOWING PAGE FOR BREAKDOWN ****

☑ The court makes the following recommendations to the Bureau of Prisons:

THAT THE DEFT BE PLACED IN A FACILITY IN THE NEW YORK METROPOLITAN AREA.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RODNEY REID
CASE NUMBER: CR-05-596(arr)

ADDITIONAL IMPRISONMENT TERMS

AS TO COUNTS ONE, TWO, FOUR, SIX, EIGHT, & FOURTEEN, THE SENTENCE IMPOSED IS ONE HUNDRED AND FIFTY (150) MONTHS ON EACH COUNT, TO BE SERVED CONCURRENTLY WITH EACH OTHER COUNT AND TO RUN CONCURRENTLY WITH THE UNDISCHARGED TERM OF IMPRISONMENT IMPOSED BY THE STATE. PURSUANT TO USSG 5G1.3(b), THE COURT HAS ADJUSTED THE SENTENCE TO DATE ON THE TEN (10) YEAR CUSTODIAL SENTENCE IMPOSED BY NEW YORK STATE ON DECEMBER 14, 2002. THE COURT UNDERSTANDS THAT THIS REDUCTION IS FOR A PERIOD OF IMPRISONMENT THAT WILL NOT BE CREDITED BY THE BUREAU OF PRISONS.

AS TO COUNT THREE, THE SENTENCE IMPOSED IS EIGHTY FOUR (84) MONTHS, TO BE SERVED CONSECUTIVELY TO COUNTS ONE, TWO, FOUR, SIX, EIGHT, & FOURTEEN.

AS TO COUNTS FIVE, SEVEN, NINE, & FIFTEEN, THE SENTENCE IMPOSED IS THREE HUNDRED (300) MONTHS ON EACH COUNT, TO BE SERVED CONSECUTIVELY TO EACH OTHER, AND TO ALL OTHER COUNTS FOR A TOTAL TERM OF IMPRISONMENT OF ONE THOUSAND

FOUR HUNDRED AND THIRTY FOUR (1434) MONTHS.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

NO TERM OF SUPERVISION IS IMPOSED.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ the above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RODNEY REID
CASE NUMBER: CR-05-596(arr)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 1,100.00	$	$ 9,000.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Melissa Check Cashing 135-07 Libert Avenue,	$5,000.00	$5,000.00	
89-61 Francis Lewis Boulevard, Jamaica, NY 11419			
Gulf Gas Station 236-01 Linden Boulevard Elmont, New York 11003	$4,000.00	$4,000.00	

TOTALS $ 9,000.00 $ 9,000.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to

penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RODNEY REID
CASE NUMBER: CR-05-596(arr)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ 1,100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E or ☐ F below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties. except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X		
UNITED STATES OF AMERICA,	:	07-CR-0596(ARR)
	:	
	:	United States Courthouse
-against-	:	Brooklyn, New York
	:	
	:	
RODNEY REID,	:	December 28, 2007
	:	11:00 a.m.
Defendant.	:	
X		

CRIMINAL CAUSE FOR SENTENCING
BEFORE THE HONORABLE SANDRA TOWNES
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Government: DAVID BITKOWER, ESQ.
United States Attorney,
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: NICOLAS BOURTIN
Sullivan & Cromwell LLP
125 Broad Street

New York, NY 10004
212-558-3920

Court Reporter: Nicole M. Warren, CSR, RMR
Official Court Reporter
Telephone: (718)613-2599

(On the record at 10:55 a.m.)

THE CRIER: United States of America versus Rodney Reid, Docket CR-05-596.

MR. BITKOWER: David Bitkower for the Government.

MR. BOURTIN: Nicolas Bourtin for Mr. Reid. Good morning, your Honor.

THE COURT: Good morning, Mr. Bourtin.

MR. BOURTIN: Also with me is Lindsay Manning who works at the firm.

THE COURT: I think initially -- I know that the various motions for a new trial were fully briefed. I'd simply like to start by addressing those.

The defendant first argues that he is entitled to a new trial because the verdict was against the weight of the evidence but the evidence against Mr. Reid was overwhelming and there is no count to conviction which the trial evidence did not strongly support the jury's verdict.

Defendant also argues that a new trial is warranted because I erred in precluding cross-examination of a cooperating witnesses regarding mandatory minimum sentences carried by firearms counts with which they were not charged pursuant to their cooperation agreements. As I believe is evident from the transcript, I determined to preclude that inquiry pursuant to the requirements of Federal Rule of Evidence 403 because I viewed the probative value of this testimony as far outweighed by its prejudicial impact and tendency to confuse the jury.

This was especially so in view of the other cross-examination of the cooperating witnesses, affording more than ample information for the jurors to make a discriminating appraisal of the cooperating witness' motives for testifying falsely, including lengthy testimony concerning their extensive criminal histories, their prior inconsistent statements, the details of their cooperation agreements, and the Government's agreement to limit the charges against them, including forbearing from bringing any firearms and certain robbery charges.

Specifically, in terms of the magnitude of the sentence reduction they believed they could earn through their cooperation, the witnesses testified to their understanding that they faced a potential sentence of life imprisonment plus 20 years. This highly specific testimony regarding the length of the sentence they hoped to avoid by cooperation was plainly sufficient to permit a jury to appreciate the strength of their incentive to provide testimony satisfactory to the prosecution.

In this regard the cooperating witnesses' testimony in this case is easily distinguished from that elicited in United States v. Chandler 326 F. 3d 210, 3d Circuit, 2003, where the witnesses acknowledged only a small fraction of their actual criminal exposure had they not cooperated.

Given the witness' acknowledgment that they faced life plus 20 years, I am in agreement with the Government that, quote, 'Whether the witness might have faced even higher hypothetical mandatory minimum sentences on uncharged firearms counts

had they breached their cooperation agreements would not have added any significant new information for the jury's consideration,' close quote.

Further, although marginally relevant at best, the testimony sought would have severely prejudiced the Government and confused the jury. It cannot be disputed -- and indeed the jury is instructed that it is the jury's -- that the jury's duty is solely to determine the facts, and the issue of sentence is committed exclusively to the Court.

Since the mandatory minimum sentences for the gun counts were of little, if any, probative value on the incentive to lie of cooperators who acknowledged facing life plus 20 years, the testimony could only have served to advise the jury of the length of the sentences defendant would face were he convicted of the gun counts.

Defendant's third argument that it was plain error to fail to give an unrequested multiple conspiracies charge is overwhelmingly refuted by the record establishing a single conspiracy and the absence of any suggestion of prejudice.

Defendant's fourth argument that he is entitled to a new trial by virtue of the prosecution's alleged violation of the Jenks Act is simply unavailing.

By order dated November 30, 2006, the substance of which is incorporated herein and referenced, I directed the prosecutor to produce for in camera inspection his outline of witness Omar Jones' direct examination and to supplement his prior affirmation regarding the content of the outline and the manner in which it was prepared.

Based on my review of all of the pertinent matter in the record, I conclude that the prosecutor's outline of his direct examination of Government witness Omar Jones does not constitute Jenks Act material.

With respect to the circumstances of the preparation of the outline, the prosecutor has confirmed that during the final pretrial meeting with the witness on July 19, 2006, he finalized a previously prepared draft of his direct examination of the witness by editing it during the interview. The draft was originally prepared from FBI agent reports; the assistants' recollection of the witness' recollection from two prior meetings; and his, quote, 'general knowledge of other witness' expected testimony and expectations concerning likely defense arguments,' close quotes.

Further, the prosecutor affirmed, although his outline was in quote, 'question and answer,' close quote, format, the answers were not substantially verbatim statements provided by the witness but rather, quote, 'skeletal phrases or concepts of summary information,' close quotes, that he intended to elicit from the witness at trial. He also noted that the outline contained, quote, 'numerous stage directions such as references to exhibits and prior testimony by the witness,' close quote.

My own review of the outline confirms the accuracy of this description.

The abbreviated questions are followed at most by brief fragmentary phrases and lists constituting a selective barebones summary of matters intended to be elicited during the examination of the witness. Such highly selected and sketchy fragments could

not possibly constitute a, quote, 'substantially verbatim recital,' close quote, of the witness's statements.

Accordingly, they are not prior statements of the witness within the meaning of the Jenks Act nor is there any suggestion in the record that they were seen, signed, or adopted by the witness. Accordingly, they were not subject to production as 3500 material.

Defendant's fifth argument is that Title 18 United States Code Section 924(c) is unconstitutional as applied in this case because the mandatory consecutive sentences called for by the statute violate the Eighth Amendment as well as the equal protection and due process clauses.

For substantially the reasons set forth in the Government's response to these arguments, I conclude that the statute is not unconstitutional on any of the noted grounds.

Further, although I do not believe that the attorney general's policy memorandum could in any event have an impact on the constitutionality of the statute, I note that the memorandum, in fact, authorizes a limitation in the number of 924(c) counts charged, quote, 'only in the context' of a negotiated plea agreement.

Reid's final motion for a new trial is founded upon the June 7, 2007, affidavit of one Ronald Washington, an inmate at the MDC awaiting sentence for conviction of a series of armed robberies in Queens and Nassau Counties.

In his affidavit, Washington states that in December, 2006, early January, 2007, he was briefly

housed in the same unit at Woodrow Smith whom Washington then knew only as Snoop; that other inmates had warned Washington that Snoop was cooperating with the Government; that, quote, 'When I' -- brackets, [that is, Washington] -- 'asked Snoop if that was true, he said that he was not going in on my people but was, instead, falsely telling the Government that people other than his friends were involved in the robberies that Snoop had committed with his friends,' close quote; and that Snoop admitted to Washington, quote, 'that he was implicating Jamaicans from Brooklyn who had not, in fact, committed the robberies,' close quotes.

Washington also states in his affidavit that when in February, 2007, he was transferred to defendant's unit at the MDC, he had discussions with Reid about Reid's case, leading to the realization that Smith had testified against Reid. Reid now argues that Washington's affidavit, quote, 'confirms that Smith committed perjury,' close quote, in his testimony implicating Reid, warranting a new trial under Rule 33 or at least an evidentiary hearing.

As the Government correctly argues, however, the Washington affidavit, far from establishing that Smith committed perjury at trial, constitutes at most impeachment material in the form of a subsequent inconsistent statement if, in fact, the statement was actually made.

Moreover, on the basis of the record before the Court, including the entire trial record and the additional matters submitted in connection with this motion, it was clear that the inclusion of

Washington's testimony in a new trial would at best be cumulative.

Implicitly acknowledging that this case is unlike United States v. Wallach, 935, F. 2d, 1357, (2d Cir. 1991) and United States v. Seijo, S-e-i-j-o, 514 F. 2d, 1357, (2d Cir. 1975), in that the new evidence in those cases, in fact, established that the witnesses had lied to the jury. Reid argues that the absence of any evidence of perjury here, quote, 'simply calls for an evidentiary hearing to determine the credibility of Smith's recantation,' close quote.

The core of Reid's argument is thus that, should the Court conclude at the close of an evidentiary hearing that Washington's assertions regarding Smith's recantation were truthful and, moreover, that Smith may, in fact, have lied at trial when he implicated Reid, then the, 'quote, Wallach/Seijo reasoning remains binding,' close quote; or at least defendant should be afforded a new trial at which to call Washington to impeach Smith.

The initial flaw in the claim is that, as Reid concedes, there is now no basis in the record to conclude that Smith lied at trial. Moreover, for the reasons that follow, defendant's showing on this motion is far too meager even to warrant an evidentiary hearing on the issue of whether Smith might have lied at trial in light of all of the other evidence before the Court.

In my view it suffices to note that a few examples of matters in the record before me illustrating why as in myriad other authorities cited by the Government denying an evidentiary hearing to establish asserted witness recantation such a

hearing is plainly not warranted on the record of this case.

First, I conclude that the Government is correct in its assertion that the statements in Washington's affidavit in significant respects simply defy common sense. The contention that, upon being confronted with Washington's suspicion that Smith was a cooperator with the Government, Smith would both acknowledge that status to Washington, an inmate awaiting trial, and volunteer that he had falsely implicated others is at best highly dubious.

Similarly lacking in credibility is the claim that Smith acknowledged lying to the Government about others to protect his friends, particularly in light of the trial record that Smith did cooperate against his friends Cheney and Spratly.

Indeed, Smith acknowledged at trial that he initially lied to the Government by omitting mention of Spratly and certain crimes that he committed with his girlfriend as he wished to protect his friends, Spratly and his girlfriend.

Defendant in his reply memorandum chose to ignore these glaring infirmities in the logic of Washington's claims, responding instead solely to the Government's observation that, contrary to the statement Washington attributed to Smith, the conspirators in this case were from Queens and Long Island, not Brooklyn.

It is true that such a discrepancy, in isolation, could well be viewed as an immaterial error in the context of this record. However, it is an error with respect to one of the few, if not the only, factual

detail related in the Washington affidavit, thus further eroding the credibility of Washington's conclusory assertions. Nor is there any dispute about Washington's history of violence, criminality, and dishonesty or his confessed distrust of and evident animus toward law enforcement cooperators that further undermines the trustworthiness of Washington's claims.

Moreover, the Government has produced an affidavit from Smith in which he flatly denies ever having made the statements of recantation that Washington attributes to him and reaffirms the truth of his testimony at trial.

Importantly, I find the credibility of Smith's affidavit overwhelmingly supported by my own assessment of Smith's candor as a trial witness. Smith, whose testimony at trial consumed well over 300 pages of transcript, was meticulously examined and thoroughly cross-examined. The incidents of his prior criminality and the respects in which his prior statements to the Government lacked candor were exhaustively explored for the jury. Based on the details of Smith's testimony and my assessment of his demeanor while on the standard, I found his testimony in all respects believable, logical, coherent, detailed, internally consistent, and moreover consistent with and corroborated by other evidence in the case which independently overwhelmingly established defendant's guilt.

Also indisputable is the abundant and disturbing evidence in the record that defendant has repeatedly sought to obstruct justice, suborn perjury, and

threatened witnesses against him both before and after their testimony.

Notably, credible evidence establishes that the defendant sought to suborn perjury from Cheney, threatened harm to Cheney and Jones, and succeeded in suborning perjury by Jones at defendant's state trial. Defendant also made threats to retaliate against Smith for his testimony at this trial by having him attacked at the MDC and killed if deported to Jamaica.

This record virtually compels the conclusion that the Washington affidavit is, as the Government argues, simply quote, 'a part of a larger pattern of obstruction of justice by the defendant,' close quote.

All of these, together with many other aspects of the record, weigh heavily against the granting of the evidentiary hearing defendant now seeks. Defendant has not begun to make out a case for a new trial based on the Washington affidavit, and the record amply proves that he couldn't do so even after the requested hearing.

The request, too, must be viewed in light of well-established authority. The courts are particularly reluctant to grant new trial motions or even evidentiary hearings based on alleged witness recantations because they are looked upon with the utmost suspicion. Defendant's efforts to distinguish those authorities expressing distrust of recantations by the supposedly recanting witness on the ground that the evidence of recantation here is supplied, rather, by a third party is wholly unconvincing.

If uncorroborated recantations by the supposedly recanting witness are too mistrusted even to warrant an evidentiary hearing, surely allegations of recantation by a third party where the supposedly recanting witness not only fails to corroborate but affirmatively denies the recantation and reasserts adherence to the truth of his trial testimony, cannot warrant anymore searching inquiry.

Moreover, both the Second Circuit and district courts within the circuit have held new trial motions unwarranted apparently without hearings in cases in which the evidence of recantation came from third-party informants rather than the trial witness.

See, for example, United States v. Astore, A-s-t-o-r-e, 309, F. 2d, 144 (2d Cir., 1962) and Fisher v. United States, 6 F. Supp. 2d, 254 and 261, Southern District of New York, 1998.

Finally, Smith's unequivocal denial here of any recantation and his clear adherence to the truth of his trial testimony is of particular significance in this case. Even if after a hearing, and contrary to the overwhelming evidence in the record of their incredibility, Washington's assertions were found of sufficient trustworthiness to present to a trier of fact, there would be no basis to bar Smith's trial testimony. At most, therefore, a new jury would hear Washington's testimony that Smith made an inconsistent statement -- evidence constituting no more than additional impeachment material.

In light of the overwhelming evidence against defendant and corroboration of Smith's trial testimony, as well as the substantial impeachment evidence regarding Smith that the first jury already

heard, I am confident that there would be no likelihood of an acquittal were a new jury to hear Washington's impeachment evidence.

Accordingly, the Rule 33 motion and request for an evidentiary hearing are denied.

Mr. Bourtin, I've reviewed the presentence report and various correspondence regarding sentences from you as well as correspondence regarding sentences from the Government; and I take it you've had an opportunity to review with your client everything that concerns his sentence.

MR. BOURTIN: Yes, your Honor.

THE COURT: Mr. Reid, are you satisfied that you had plenty of time to go over with Mr. Bourtin everything that pertains to your sentence?

THE DEFENDANT: Yes, your Honor.

THE COURT: Let me let you go ahead.

MR. BOURTIN: Well, I understand your Honor's ruling on our motions. They leave sort of very little room left, I think, to argue the sentence here given the mandatory nature of the 924(c) counts. It's a bit of an academic exercise, you know, given the time that we're talking about; but I would just like to address them and make a few comments.

You know, this case in which, you know, a now 28-year-old man has been incarcerated since he was, I think, 23 for essentially these charges, is facing, you know, approximately a 20-year sentencing guideline sentence plus 107 years mandatory consecutive time strikes me as one that, you know, I've never seen in my experience, I've never heard of.

I think the Government's decision on how to charge this case from the beginning was abusive of the prosecutorial power; and I think it's left the Court, although we think there is ample authority for the Court to find a different sentence appropriate here, under the law based on your Honor's ruling it leaves us with very little to talk about.

In terms of the reasonableness of the presentence report and the calculation of Mr. Reid's guidelines, you know, I would say that in comparing this sentence here with what the Government agreed was reasonable for Mr. Reid's codefendant, Sean Cheney, it's very hard to square the two.

How, you know, a mistake in the prosecutor's calculation for Mr. Cheney could lead to a, you know, a 13-year sentence -- and the Government said in that case that that was reasonable based on, you know, that was the negotiated plea, followed by a mandatory I believe it was seven-year consecutive sentence in that case -- and then to now say that a guideline range that is double that and a mandatory consecutive sentence that is, you know, many times seven years, the end result here would be a sentence more than 100 years longer than that given to Sean Cheney and for the life of me I can't understand how that can be, you know, justice in this case, your Honor.

I understand that there must be incentives to pleading guilty rather than going to trial, but I don't see any justification for a 100-year discrepancy in someone's sentence based on the fact he exercised his constitutional right to be tried by a jury.

You know, in our view, you know, a reasonable sentence here, if you assume that the mandatory consecutive sentence, as your Honor has ruled, is not in play and that a 107-year minimum is necessary would be to impose no sentence under the guidelines because if the touchstone here is that you -- under, you know, the Booker and its progeny, the Court should impose a sentence sufficient but not greater than necessary, then, you know, how a 107-year sentence doesn't already exceed that directive is something that I don't understand.

You know, I would ask the Court to impose only the statutory minimum and not to impose any additional time under the sentencing guidelines.

THE COURT: Mr. Bitkower.

MR. BITKOWER: Judge, before I address the sentencing, I note the Court didn't orally respond to Mr. Reid's pro se motions for a new trial. He had, I believe, three bases in that pro se motion which the Government did respond to in its letter of October 6, 2006. I can hand a copy up to the Court.

THE COURT: I probably didn't. It's been so long that this has been pending.

MR. BITKOWER: I'll hand a copy to your Honor.

THE COURT: Well, first of all, as the pro se motion addresses the accuracy of the jury instructions, I think the jury instructions were correct. I believe actually I already addressed the legal sufficiency of the evidence.

MR. BITKOWER: Yes, your Honor.

THE COURT: I do not believe a new trial is warranted based on the argument that there are defects in the indictment.

MR. BITKOWER: Your Honor, we responded to those arguments in Point 5 of our letter of October 6, 2006, which is pages 18 through 19 of that letter. I can also hand a copy of that to the Court as well.

THE COURT: The reasoning at pages 18 to 19 of the Government's brief I think substantially sets forth my view of the reasons for objecting to the arguments in defendant's pro se brief of August 17, 2006.

Hand these back.

MR. BITKOWER: Thank you, your Honor.

Your Honor, I'll be very brief in the sentencing claim. I'll just note that this conviction for the defendant involved a series of violent and life-threatening robberies as we discussed in our papers. In addition, it's the defendant's twelfth conviction of which one, as the defendant points out, was for one of the crimes that is part of this pattern; but even taking that aside, it would be his eleventh criminal conviction.

With all that in mind, unless the Court wants me to address something specifically, I would submit that the guideline sentence is reasonable.

MR. BOURTIN: Your Honor, again, this is all academic but just for the record, I would point out that all of the same arguments would apply to Sean Cheney who certainly had a long criminal record and who personally, you know, fired a firearm at people

during robberies which has never been an allegation made against my client and, yet, you know, the Government found in that case that a disproportionately lower sentence was reasonable for Mr. Cheney. I just can't see how that can be consistent with their position today.

THE COURT: Well, let me say that the exercise of examining Mr. Reid alongside Mr. Cheney is something that, as I understand it, I'm not supposed to engage in in the first place.

Let me first hear from Mr. Reid. Is there anything you would like to say?

THE DEFENDANT: Your Honor, I'm at a loss for words. I don't -- I just know for a fact that, like, everything in me's telling me that what's been -- what's taken place is wrong but I don't even know what to say to it. I don't know, you know. I just know I just can't really see the justice in this, like my attorney said. I can't, me, personally see.

Often by myself I think about what I'd say to you if I had the opportunity but like right now, I mean, I don't know what I could say to -- I just know that what's being done is wrong in my heart. That's how I feel.

THE COURT: Well, let me say obviously I have to agree with defense counsel that I have never imposed a sentence anywhere near this or seen a situation like this; and it makes it very difficult to be in my position.

Having said that, unless I'm wrong about the law, I don't really think I have many choices.

If I look at the conduct underlying Count 1, 2, 4, 6, 8, and 14, as well as all of the other factors relating to the defendant and the circumstances and his history and danger and all of that, just focusing on that, weighing the statutory factors in the context of this case, it does seem to me with respect to those counts a sentence of 210 months which is the bottom of the advisory guidelines is sufficient but no greater -- of no greater severity than necessary to accomplish the goals of sentence.

Obviously, this figure does have to be adjusted by the time that Mr. Reid spent in state prison before he was writted into Federal prison. That was something under 34 months; but rounding it off to 34 months, I would adjust the sentence on the noted counts to 176 months.

MR. BOURTIN: Can -- I'm sorry, your Honor. There's something I'd like to clarify. My understanding of the way the Bureau of Prisons will view his prior term in prison is that even the period that he's spent since he's been writted over will not be considered as Federal custody. I believe this is, because he's a writted prisoner, he's still considered kind of the property of the state system, so to speak, so that I would ask --

THE COURT: What is the number of months?

MR. BOURTIN: I would ask the Court to include from December --

THE COURT: You're saying from --

MR. BOURTIN: December of '02 until today. I think until he's sentenced by your Honor, he will not be considered by the United States Bureau of Prisons

to be in their custody. So, if your Honor's intention is to credit him for all the time he's served --

THE COURT: I'm required to credit him for time spent in state custody. I'm required to give him that time. So, the question is: Are you in disagreement as to whether or not he's in state custody while here?

MR. BITKOWER: I'm not in disagreement about that technicality. As a technical legal matter, my understanding of the law is that when Congress passed -- I can't recall the particular statute at this point which deals with how to credit or not credit prior state time to Federal defendants. Congress did make a decision that that should be left up to the Bureau of Prisons and not up to a sentencing judge to figure that out.

THE COURT: It's my understanding -- wait -- that in a situation where defendant is convicted in state court for conduct, all of which is taken into consideration in his Federal sentence, not only should his Federal sentence run concurrently with the state sentence but insofar as there was time spent in the state that can't be captured in the Federal sentence, I'm supposed to downwardly adjust the Federal sentence to accommodate that time.

MR. BITKOWER: I have no dispute with the time before he was brought here. The question now is whether the Court should reduce the sentence for the time where Mr. Reid was here on the writ or whether the Bureau of Prisons should decide whether, pursuant to their guidelines, they will credit that time to his sentence that your Honor imposes.

In other words, the Bureau of Prisons has a regulatory manual which determines what time should be credited toward a sentence imposed by the Court. There are various guidelines. They're extraordinarily complicated. I went through this in another case. There are diagrams that look like they're from the mainframe database in terms of what they choose and not choose to credit in determining the Federal statute which addresses this exact question. So, Congress has not left that question up to a sentencing judge to reduce the sentence for that period of time but left it to the Bureau of Prisons --

THE COURT: You're saying the 34 months.

MR. BITKOWER: The time before he was brought here, yes. I have no objection to crediting that time or reducing the sentence by that time. The other question is whether it's not a question of reducing but a question of crediting, and crediting is carried out by the Bureau of Prisons.

I would state as Mr. Bourtin has stated before that's sort of an academic question. If there's a later time where this comes back down from another court and it's not academic, I'm not going to have an objection to him raising the same objection and we can litigate it thoroughly, but my objection of the law without having litigated it thoroughly it's a question for the Bureau of Prisons rather than for the sentencing judge.

MR. BOURTIN: Well, and my position, Judge, is that I'm almost certain I'm right about this. The Bureau of Prisons will not credit him for that time. They will consider it state time since his arrest or

since his writ to Federal court; and the time that your Honor imposes sentence, the Bureau of Prisons will consider that state time. So, unless your Honor credits and unless your Honor factors that into the sentence that you impose --

THE COURT: What's confusing me, Mr. Bourtin, is how your estimation of what the Bureau of Prisons will do intersects with what the law tells me to do in terms of crediting him for time that would otherwise never be credited by the Bureau of Prisons. That's what I don't understand.

MR. BOURTIN: Well, I think --

THE COURT: I hate to put this sentence off again, frankly.

MR. BOURTIN: And I don't think you have to. I think if the JNC issue in this case -- if you are reducing a sentence by I think it amounts to 5 years, 60 months because it's December, '02 until now, December, '07, that you will effectively have incorporated his state term to run concurrent with the Federal sentence. I think if that's clear in the JNC, the Bureau of Prisons will have no problem with it and he will --

THE COURT: Well, what about this? What about if I simply reduce -- eliminate the 34 months and tell the Bureau of Prisons that it is my intention that he be credited against this sentence with all time spent in Federal custody and that's the reason that I impose the sentence that way?

MR. BOURTIN: I think what -- what Mr. Bitkower's saying is the Bureau of Prisons will say what he gets credit for is our determination.

Whatever intent your Honor expresses is not binding on that. If your Honor makes a ruling and imposes a sentence, subtracting 60 months from whatever guideline term your Honor finds appropriate, then I think the Bureau of Prisons will go about its ordinary business and your Honor's intent will be affected.

MR. BITKOWER: That's exactly the point I was making earlier. If the Bureau of Prisons reads the statute and regulations to mean he should not be credited -- and I'm not saying they will or will it not -- if that is the way they ultimately read it, that's because that's the law passed by Congress and interpreted in its discretion by the Bureau of Prisons. Although 3553(a) gives courts great discretion how to structure a sentence, it doesn't give them discretion; and I don't read the Kimbrough case to change that ruling to essentially tailor a sentence to avoid the application of an otherwise valid congressional statute which addresses this particular exact question.

MR. BOURTIN: I think this is where Mr. Bitkower's wrong because the Bureau of Prisons is applying its own regulations. They're not applying the law as it applies to prior state court sentences. The Bureau of Prisons will not credit him for the 33 months before he was writted over here. Doesn't mean by law he shouldn't get credit for that. That's the distinction.

What I'm saying to your Honor is if by law he should get credit for his state sentence that should be 60 months because the Bureau of Prisons will consider the last. However, it is I think it was late

August of '05 until now, they will consider those last two years and four months to be a state court sentence.

So, if your Honor doesn't include those, then I think the Bureau of Prisons will end up imposing a sentence on Mr. Reid that will not be consistent with the law, as your Honor just explained.

MR. BITKOWER: Your Honor, I agree the Bureau of Prisons will impose its own regulations but under traditional Supreme Court authority, the Supreme Court or any other court will review the statute and so far as the agency which is charged with administering that statute has reached a reasonable conclusion about what that statute means will apply it, that's the way that statute works. That's the way all statutory interpretation works, and to that extent Congress has spoken on this particular issue.

So, again, perhaps this is something that could be litigated thoroughly if it's necessary to litigate it thoroughly and, again, I make no objection to the defendant raising this again, should it become practically relevant but in terms of what the law requires now, I don't remember the precise statutory term, it -- the guidelines do refer to it.

THE COURT: I have no reason to believe it won't get litigated anyway.

MR. BOURTIN: The Government would have as much of a right to litigate this at another point. I mean, the Bureau of Prisons' directives are very clear on this that they need the JNC to read clearly as to what time the judge intends to give to include

as being concurrent. It's not a question of credit or not. It's a question of what's concurrent; and if your Honor wants his state court sentence to be concurrent, then I think the law is clear and the Bureau of Prisons regulations are clear that his state court sentence begin in December of '02 when he was first arrested and end on the day that your Honor issues the JNC. So, that's my point.

This isn't a question of the Bureau of Prisons applying the law or not. This is a question of what portion of his prior sentence your Honor runs concurrently. It's not a credit question. The Bureau of Prisons will not credit him for the last two-and-a-half years in Federal custody.

So, if your Honor wants that period to run --

THE COURT: Well, what the guideline reads is that the Court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the Court determines that such period of imprisonment will not be credited to the Federal sentence by the Bureau of Prisons.

If subsection (b) applies, this is application note 2(c), and the Court adjusts the sentence for a period of time already served, the Court should note on the judgment in a criminal case order, one, the applicable section which is 5G1.3B(S); two, the amount of time by which the sentence is being adjusted; three, the undischarged term of imprisonment for which the adjustment is being given; and, four, a sentence reduction for a period of imprisonment that will not be credited by the Bureau of Prisons.

MR. BOURTIN: And, your Honor, this period of imprisonment, my understanding is that it will not be credited by the Bureau of Prisons. I think this is exactly what we're taking about.

MR. BITKOWER: Can I have just a minutes to read this?

THE COURT: Yes.

MR. BITKOWER: Judge, after reading this, the problem is slightly different than I had seen it to be earlier. The question now is not whether the Bureau of Prisons won't credit the time. The question is will the Bureau of Prisons credit that time. If they will, then reducing the sentence by the amount suggested by the defendant would in effect give double credit for that time if the Court reduces the sentence and the Bureau of Prisons gives credit for that time.

THE COURT: Let me ask you something. Given the somewhat academic nature of this, does the Government really object? Because, frankly, if we keep arguing and everybody's upset about it, we're going to go off and brief it.

MR. BITKOWER: Judge, I would -- I don't know that I can suggest the Court overrule my objection because obviously that's sort of paradoxical.

Not knowing how the Bureau of Prisons will treat this, not having looked at it, I can't say that I don't object to it. I object it to but perhaps the best course for the Court to take is to continue over my objection and should it come back, we'll brief it then.

MR. BOURTIN: It --

THE COURT: There's also the question of whether it will come back on this ground. In other words, if I have to decide it, I don't want to make the court of appeals decide it because I was too lazy to decide it.

MR. BITKOWER: If the Court overrules our objection -- and obviously I can't bind myself at this point but I don't expect the Government is going to appeal the Court's determination on that basis. So, as a practical matter, I don't see it as coming back on that ground if the Court rules in favor of the defendant.

THE COURT: Okay. Okay. In light of the fact it sounds that the parties are not going to address this directly in any other forum, unless it comes back to me for resentence for some reason or for a new trial or for whatever, I will -- I'll credit the entire time.

Has anyone calculated the number of months?

MR. BOURTIN: It would be 60 months, your Honor. It's a little over 60 months. He was arrested December 12th, I think, 2002; and it's now December 28th, 2007.

THE COURT: Okay. So, that brings it down to 150 months; is that right?

MR. BOURTIN: Yes your Honor.

THE COURT: Okay. Then I will sentence defendant to the custody of the attorney general for a period of 150 months on Counts 1, 2, 4, 6, 8, and 14 to run concurrently with each other and any undischarged state term of imprisonment.

I will also impose a restitutionary order in the amount of $9,000 payable at the rate of $25 per quarter while Mr. Reid is in custody.

On Count 3 I sentence Mr. Reid to the custody of the attorney general for a period of 84 months, or seven years, to be served consecutively to the sentences already noted on the other counts.

On Counts 5, 7, 9, and 15 --

MR. BOURTIN: I'm sorry, your Honor. On Count 3 what was the terms?

THE COURT: It's 84 months consecutive.

On 5, 7, 9, and 15 it's 300 months on each count consecutively to each other and consecutively to all other counts and a special assessment of $1100.

Obviously, Mr. Reid, you may appeal both the conviction and the sentence. You've been well represented. I'm sure Mr. Bourtin will continue to represent you on appeal.

MR. BOURTIN: Yes, your Honor.

MR. BITKOWER: For the record, does the Court intend to impose a term of supervised release?

THE COURT: No.

MR. BOURTIN: Your Honor, one last thing. The defendant would request, so that his family can visit him more easily, that the Court recommend that he be assigned to a facility as close to the New York city area as possible.

THE COURT: Absolutely.

MR. BOURTIN: Thank you, Judge.

(Whereupon the proceedings conclude.)

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENT EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESS FILE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST

INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of November, two thousand eight,

PRESENT:

HON. JOHN M. WALKER, JR.,
HON. BARRINGTON D. PARKER, and
HON. REENA RAGGI,
Circuit Judges.

United States Court of Appeals
Filed
Nov 12 2008
Catherine O'Hagan Wolfe Clerk
Second Circuit

UNITED STATES OF AMERICA,
Appellee,

-v.-

No. 08-0134-cr
SUMMARY ORDER

RODNEY REID,
Defendant-Appellant.

FOR APPELLEE: David M. Bitkower, Assistant United States Attorney, Eastern District of New York (David C. James, Assistant United States Attorney, *on the brief*), Brooklyn, N.Y.

FOR APPELLANT: Nicolas Bourtin (Samuel W. Seymour and Allison Caffarone, *on the brief*), Sullivan & Cromwell LLP, New York, N.Y.

UPON DUE CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Eastern District of New York, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Appellant Rodney Reid ("Reid") appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Ross, *J.*). Reid was convicted of conspiracy to commit robbery and five counts of robbery in violation of 18 U.S.C. § 1951(a), and five counts of possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). We assume the parties' familiarity with the facts, procedural history, and scope of the issues presented on appeal.

Reid contends that both his warrantless arrest and the police's subsequent search of his hotel room were unconstitutional. Warrantless arrests are lawful when supported by probable cause. *See United States v. Watson*, 423 U.S. 411, 423 (1976). Any kind of seizure, including an arrest, requires "*either* physical force. . . *or*, where that is absent,

submission to the assertion of authority." *United States v. Baldwin*, 496 F.3d 215,218 (2d Cir. 2007) (omission in original) (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). Neither occurred in the hotel room. Reid therefore was arrested when he exited his hotel room and submitted to police authority. At this point, there was ample probable cause to believe that he had participated in the Melissa Check Cashing store robbery, and that he had engaged in additional criminal activity including arson and hindering prosecution throughout his standoff with the police.

We further hold that the search of his hotel room was constitutional and that the items recovered were properly admitted at trial. We see no reason to discuss the District Court's determination that the hotel owner had given the police consent to enter and search Reid's room. *See Simms v. Vill. of Albion*, 115 F.3d 1098, 1108-09 (2d Cir. 1997) (holding that search outside 3 the scope of arrest warrant was lawful because motel owner had given police consent). Moreover, the District Court also properly concluded that the hotel's post-check-out grace period could not have extended until the arrest, which occurred at approximately 4:00 p.m. *See United States v. Rahme*, 813 F.2d 31, 34-35 (2d Cir. 1997) (holding that "when a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy" in the room or articles therein).

Reid also claims that the District Court improperly curtailed his cross-examination of the government's cooperating witnesses. We review this decision for abuse of discretion and see none. Reid

already had elicited testimony from the cooperating witnesses reflecting their motivation to lie and their extensive criminal histories. In addition, the District Court was understandably reluctant to expose the jury to potentially highly prejudicial information regarding both the potential sentences the witnesses would have faced had they been charged and convicted under 18 U.S.C. § 924(c), and the sentence Reid actually faced under that statute. For these reasons, we hold that the District Court's curtailment of Reid's cross-examination on this point was not an abuse of discretion. *See United States v. Pabon-Cruz*, 391 F.3d 86, 94 (2d Cir. 2004) (holding that defendants generally have no right to charge informing jury of sentencing consequences of its decisions); *see also United States v. Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995) (upholding district court's decision that the "value" of the sentencing information regarding the § 924(c) charges witnesses avoided by cooperating "was outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing").

Reid next contends that the government violated his rights under the Jencks Act, 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), by failing to turn over an Assistant United States Attorney's notes taken at the government's final meeting with a cooperating witness who testified against Reid. The District Court parsed the notes *in camera* and found that they did not contain a "substantially verbatim recital" of the witness's prior statements. Reid has not directly addressed this finding on appeal, and we

will not disturb it. In addition, we find no violation under *Brady* or *Giglio*. There is no reasonable probability that the scant additional information contained in the notes, if provided to Reid, would have resulted in a different verdict, given the substantial information on this witness that Reid obtained from the § 3500 material and from the witness's direct examination.

Reid also challenges the District Court's failure to give the jury a multiple-conspiracy charge. Since Reid did not request such an instruction, we review this omission for plain error. As we held in *United States v. Thompson*, "[t]he trial court's failure to give a requested multiple-conspiracy charge, even one that is entirely correct, does not result in prejudice where the evidence was sufficient to permit the jury to find beyond any reasonable doubt that the defendant was a member of the single conspiracy alleged." 76 F.3d 442, 454 (2d Cir. 1996) (citation omitted). Because we believe that there was sufficient evidence for the jury to convict Reid of the conspiracy charged in Count 1, we find that Reid sustained no prejudice as a result of the District Court's failure to give the charge and thus has not established plain error.

Likewise, the District Court's failure to grant a new trial or to hold a hearing based on the new evidence supplied by Ronald Washington suggesting Woodroe Smith's recantation was not error. A motion for a new trial based on newly discovered evidence is granted only in "extraordinary circumstances," and is "committed to the trial court's discretion." *United States v. Torres*, 128 F.3d 38, 48 (2d Cir. 1997) (citation and internal quotation marks

omitted). A failure to grant a new trial on the basis of such evidence is reviewed only for abuse of discretion. *Id.* We agree with the District Court's analysis discrediting Washington's affidavit and substantiating Smith's credibility, and 'find no abuse of discretion.

Reid next claims that 18 U.S.C. § 924(c) has been applied to him unconstitutionally, in that his 107-year sentence violates his rights under the Fifth and Eighth Amendments. In view of the fact that Reid had ten prior convictions, four involving violence and two involving firearms, and committed the instant armed robberies while on probation for armed robbery, we see no basis for his contention that a life sentence for a recidivist armed robber violates the proportionality principle of the Eighth Amendment. *See Ewing v. California*, 538 U.S. 11, 21 (2003) ("[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)) (internal quotation marks omitted)).

We similarly reject Reid's Fifth Amendment arguments. Reid contends that his sentence under section 924(c) fails "rational basis" scrutiny under the Fifth Amendment's implicit equal protection principles, and also that the statute vests excessive sentencing authority in the executive branch. We find that Reid has failed to show that the classifications created by section 924(c) are arbitrary and not rationally related to a legitimate government interest. *See Tanov v. INS*, 443F.3d 195, 201 (2d Cir. 2006). Furthermore, it is clear that the Constitution

permits the exercise of prosecutorial discretion in charging section 924(c) violations absent use of "an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

We have considered Reid's remaining contentions and find them to be without merit.

The judgment of the District Court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA	:	
	:	CR-05-596
v.	:	
	:	U.S. Courthouse
SEAN CHANEY,	:	Brooklyn, New
	:	York
Defendant.	:	
	:	
	:	December 18, 200(
		4:00 o'clock p.m.

- -x

TRANSCRIPT OF SENTENCE BEFORE
THE HONORABLE ALLYNE ROSS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	ROSLYNN R. MAUSKOPF United States Attorney By: STEVEN WEISER Assistant U.S. Attorney 225 Cadman Plaza East Brooklyn, New York 11201
For the Defendant:	ANTHONY RICCO, ESQ. GARY VILLANUEVA, ESQ.
Court Reporter:	Anthony M. Mancuso 225 Cadman Plaza East Brooklyn, New York 11201 (718) 613-2419

Proceedings recorded by mechanical stenography,
transcript produced by CAT.

(Case called; both sides ready.)

THE COURT: Let me just say that I have read the presentence report as well as Mr. Ricco's lengthy letter as well as Mr. Weiser's response and I take it, counsel, that you have had plenty of time to review with Mr. Chaney everything pertaining to his sentence, is that correct?

MR. RICCO: Yes, your Honor.

THE COURT: Mr. Chaney, are you satisfied that you have had plenty of time to go over with your lawyers everything that concerns your sentence?

THE DEFENDANT: Yes.

THE COURT: Let me say at the outset in the plea agreement the parties had reached a guidelines calculation that differs from the calculations that are set forth in the presentence report. Notwithstanding that, both parties have urged me to accept the calculations in the plea agreement, which is, as I understand it, 37 to 46 months on counts 1 and 6 and consecutive 120 months on count seven. And I am willing to do that, to adopt that as an advisory guidelines calculation in this case.

I understand there's a dispute as to whether it should be consecutive or not.

MR. WEISER: I would actually frame it a little differently. I'm not sure that is the appropriate advisory guidelines.

However, the government would agree that a reasonable sentence under the factors in 3553, under the circumstances, could be in that range.

THE COURT: All right.

MR. RICCO: I would agree with Mr. Weiser.

THE COURT: That's fine.

MR. WEISER: I think the advisory guidelines are accurate as they are reflected in the presentence report.

THE COURT: Go ahead.

MR. RICCO: Well, your Honor, my letter lays out most of what I had to say in connection with the sentencing of Sean Chaney.

I would say, judge, that we're very happy to have had the opportunity to represent Mr. Chaney, also very happy that Mr. Villanueva had the time to also work on the case when I was involved with the capital case in Philadelphia, because I think that collectively Mr. Villanueva and I have had an opportunity to spend time with a young man who was at the threshold of making a mistake that would have probably cost him many, many years in prison.

And it was clear to both Mr. Villanueva and myself that Mr. Chaney desperately wanted to find a way out of the case, find a way out of the circumstances that he was in, but was unable to get it done.

Without going into his background, his parents and the circumstances of which he was really born into, as the court knows, his father is serving a life sentence, didn't know Sean from the time he was ten. Sean has seen his mother just recently after fourteen years.

He has learned through his life as a young person in prison how to stand up for himself. And in

a negative environment he learned a very positive trait. And that trait came to play in both Gary's and my interaction with him. He ultimately realized it was in his best interest to stand up for and accept the consequences for where he was. It was a very special experience to be a part of that.

There's something in the presentence report that the court does to the know about that I think really bodes well for the redemption of Sean Chaney, that is, as Sean does not have any natural children, for several years he had a relationship with a young woman who had a little daughter and because of Sean's incarceration he was separated from the little girl, who cried for him.

Sean was not in touch with the girl and the little girl has not been in touch with Sean. And myself and Mr. Beckels, who is present in the court, who has helped us with the case, tried to encourage Sean to reach out to her, to try to have a positive influence in her life. It would be something for him to do and important for her because Sean was sort of a friend as a young child. At first he resisted it. He felt it was too painful for him. He said he wasn't going to do it. We spent a lot of time talking about it and we left it there.

I recently discovered, unbeknownst to myself, that Sean actually did reach out for the little girl. Unfortunately, he was rejected by the family and it didn't happen. But it was important to see that although this was something that was very painful for him to do he was able to see the logic and sense of it and was willing to do it and I would hope that Sean would continue to reach out and move in

directions that might be painful for him. They don't always work out. Sometimes the door is shut in your face but it's the effort that counts and it's been a great experience to be part of this young man's situation.

Yes. We're here for a criminal case. I don't care how you shake it, judge, 13.1 or 13.10, thirteen years in prison is a long time. It's a lot of time for Sean. It's a lot of time for him to grow and to think about what his life is going to be like and hopefully he won't have the life that his father had which was a life in prison and we are going to continue to try to reach out to Sean as he travels through the next few years of his life and hopefully something good will come out of a very bad experience, a very serious experience.

But to meet him and to see how bright he is and how promising and the potential he has it's just a terrible waste to see it not developed. And he seems to be willing to try and that's all we can ask of him at this point.

Gary.

MR. VILLANUEVA: Thank you, your Honor.

I think Mr. Ricco adequately described Mr. Chaney. I would just like to add that in getting to know Mr. Chaney that he is only limited by his own aspirations. He's a bright person. He's talented. And I expect great things from him when he is released from prison. I think he has the talent and the courage inside of him to reach for the best in him. And I would just like to share that with the court.

Thank you.

THE COURT: Mr. Chaney, is there anything that you would like to say?

THE DEFENDANT: Yes, your Honor.

I am just happy that this is finally coming to an end because the way I have been described in paperwork. And all that, I'm not the same person that was arrested four years ago for these crimes. And I understand the pain that I have caused to the victims of my behavior, as well as my family and because of the time that I've already served incarcerated, I've become more than contrite. Incarceration is not one of the goals that I set for myself and robbery is not one of the traits that I care to learn more about.

I don't want to minimize my behavior by saying I just made a mistake because I know right from wrong. But at 19, 20, being free from chastisement I just ran wild in the environment that I lived in. I ran wild. I'm not saying it's right and I'm not minimizing my behavior. It was wrong. My silence during this case was not an act of defiance. It was just that once upon a time all of us were friends and I just felt that friends are not supposed to betray one another. So I stayed silent.

I just hope and pray you would be as lenient as possible. They say behind every struggle there's a blessing or God doesn't give burdens you can't handle. So no matter the outcome of today I feel like my prayers have already been answered. I feel like this situation is not redeemable.

Thank you for letting me speak.

THE COURT: Did you want to add anything.

MR. WEISER: Perhaps the most telling facts about this defendant actually came in the defendant's submission where they counted the amount of months that this defendant was on release. I view it exactly oppositely, however, from the defendant, which was ten months.

This defendant was a one-man wrecking crew every minute that he was on release. All he knew and all he did was commit crimes, repeatedly, over and over. He was out for ten looks and look at the litany of crimes that he has committed since the age of fourteen, starting with assaults, ranging to robberies, armed robberies, violent robberies.

And it didn't stop there. You, I'm sure remember the testimony of Arquimedes Lopez. Sean Chaney tried to kill him, not because he was armed but because he walked outside and was screaming at him after a robbery. Sean Chaney pointed a gun at him and shot repeatedly. This is the defendant who you are sentencing.

He also -- at the end of this it wasn't just enough to shoot at the robbery victims. You remember what happened when they were hold up for eight hours in JFK at the end of this robbery rampage that likely was well in excess of 50 robberies that were committed by he and Rodney Reid. At the end of that rampage when they were finally caught and were attempted to be brought to justice they both sat in the hotel room while Rodney Reid was threatening the police if they came in there was going to be a shoot-out. Sean Chaney with a loaded firearm in his

lap, Rodney Reid, a loaded firearm in his lap, staring at the door waiting for the police to dare enter.

This defendant although claiming remorse now has no understanding of how to behave and frankly the government has a great fear of what he will do, if he's still capable, given all he has ever done since the age of fourteen is to continue over and over to commit serious, violent crimes. It's for that reason that the punishment the government believes is appropriate is a minimum of 20 run consecutive to all of state court time that was proposed in the plea agreement in light of all the factors in 3553, and your Honor's discretion, we urge that in light of the seriousness of the crimes, the damage to the victims.

Your Honor will also remember looking at those videotapes that Sean Chaney was not just seeking money. During numerous of those robberies, if not all, there was plenty of vengeance. There was repeated strikes with a firearm to the head of one of the owners of the gas stations that we all saw on video that was perpetrated by Sean Chaney.

You also remember there was one gas station robbery where Sean Chaney repeatedly punched an attendant in the face, and the testimony from the cooperating witness was why, the guy wasn't resisting. He was giving up his money and the testimony was, as was obvious from the videotape is, he liked it. He was doing it for the heck of it. He got the money. He kept getting the money, and he kept punching him in the face.

This defendant, although, is getting a significant reduction from the calculated guidelines of the presentence report based on all of the parties'

acknowledgment here. The government's view is he certainly does not deserve more.

MR. RICCO: Judge --.

THE COURT: Just to clarify things because now we have made it very clear that the advisory guidelines depart vastly from the parties' agreement.

What is it that the government agrees is a factor that warrants a sentence that you are endorsing?

MR. WEISER: Your Honor, there are a few factors under 3553 that could warrant a reduction from the 30 year guideline to the sentence that the government is proposing. One of them is the age of the defendant. Another is the influence of Rodney Reid. Although the government would add that that would not deserve such a huge benefit because many of his actions were undertaken without Rodney Reid present, such as the attempted murder of Arquimedes Lopez.

THE COURT: I'm not disagreeing with you. I'm asking how I can possibly impose the sentence.

MR. WEISER: I understand.

And because the government feels constrained by its plea agreement, the court is not so constrained.

My acknowledgment that we are not seeking a sentence beyond that is an acknowledgment of an element of fair dealing.

THE COURT: A sentence within the plea agreement is justified by the statutory factor, you have acknowledged.

MR. WEISER: That's right.

THE COURT: All I'm asking which statutory factors.

MR. WEISER: I understand, your Honor.

I think primarily I've listed two of them.

It's an interesting question under 3553, whether -- and obviously it was a serious motivating factor for the government in agreeing to that recommendation, the fact of our prior understanding. Certainly there is a measure of fair dealing that the government does not want to offer an agreement and then because the guidelines that we estimated, believed were appropriate turns out to be different, it would be manifestly difficult to urge the adoption of a guideline which is effectively an attempt at trickery.

THE COURT: I have to account for myself, too. The government has taken a position, so I would like to know how I can act within that position.

MR. RICCO: Judge --

THE COURT: I think I would like to hear from Mr. Weiser first.

MR. WEISER: Certainly there are several of the factors that are difficult. The primary two that would jump to mind would be the age of the defendant. Certainly it's not --

THE COURT: How old was the defendant?

MR. WEISER: I think he was correct in his estimation that he was 19 or 20.

THE COURT: It was 19 to 20, is that right? Let me just check that with Mr. Ricco.

MR. RICCO: Yes, your Honor.

THE COURT: Was he a young 19?

Go ahead.

MR. WEISER: The defendant has suggested some difficult family circumstances that affected his ability to make appropriate judgments. We don't dispute that he didn't have any guidance in terms of living a law-abiding life.

THE COURT: Okay.

MR. WEISER: The difficulty that I recognize in this is the reason that the government certainly felt constrained that the sentence should be consecutive and that's why we made that, which is within your Honor's discretion.

THE COURT: Certainly.

Let me just say that because you've agreed on a calculation, for my purposes, that doesn't incorporate the Melissa robbery. Then under 5G1, it should be consecutive. There's no reason to run it concurrently.

MR. WEISER: Offhand, frankly, I'm not sure there are other factors, in addition to those three stated, that would support the reduction in sentence.

THE COURT: But it's the government's position this does support the sentence recommended by the plea agreement?

MR. WEISER: Yes, your Honor.

THE COURT: Okay.

THE COURT: Anything further?

MR. RICCO: Yes, your Honor.

Your Honor, I think that the defendant in this case pled to count one which was a conspiracy count.

THE COURT: Yes.

But the way that the guideline works is that the crime, the underlying crime, must be calculated. In order to incorporate the prior sentence and concurrent sentence, the current sentence has to be a product of that activity. Had I adopted the Probation Department's calculations, the Melissa robbery would have been incorporated in that sentence.

MR. RICCO: I understand.

THE COURT: The sentence as you and Mr. Weiser originally determined it to be under the plea agreement is not in any way adjusted for the Melissa robbery which is the robbery for which I understand he was convicted and incarcerated in the state.

MR. RICCO: Does it not fall under Subsection C that says: And any other case involving undischarged time the court may partially --.

THE COURT: I thought you had argued that it was mandatory. I misunderstood your argument.

MR. RICCO: Judge, I think in my letter I did say "must." I think you're right. My letter did say "must." It certainly may.

I would like to say this: I think that the reason why a nonguideline sentence is appropriate and 3353(a), subsection 3, talks about the other sentences available. Judge, this is an interesting case. On the one hand we have a young man before the court who was in prison at age fourteen serving three years. So on the one hand the probation report looks at him

and says he's terrible. He's fought. He's committed crimes. As Mr. Weiser said, he's a one man wrecking crew and we look at those facts and we say, wow, that's terrible.

But in order to find a sentence that's sufficient but not greater than the necessary, the natural question is why? What's happening here? Who is he? And how do I, as a court, determine what is the appropriate sentence without that information? That part of Sean Chaney's life is the why factor. It's unusual for a fourteen-year-old to get a three-year sentence. Usually at this age there's all kinds of alternative sentences.

I thought it was interesting that the probation report talked about the fact as a young man he fought in jail and that showed that he would have difficulty adjusting in jail. And he fought in jail as a young person. He fought as a fourteen-year-old to keep himself from being severely injured by other defendants who had a different mind frame for what they wanted to do with him. So he fought.

And the young that people go to these facilities at 13, 14, they come out at 17 and what have they learned? They have not learned much. One of the shining aspects of Sean Chaney is that he's one of the rare young people who somehow got his GED. So with all of this going on in the jails with him, up until today, judge, up until today, since age fourteen Sean Chaney has only been at liberty less than a year.

And if the court imposes a sentence in this case he will have spent from age fourteen to about age 37, 38 in prison. It just seems to me that if the court is

fulfilling the directives of 3353(a), which is to find a sentence that is sufficient but not greater than the necessary, when you look at the defendant under subsection 1, the nature and characteristics of the offense and the history and characteristics of the defendant, you learn about where all of the anger in his life comes from and what is the prospect of him going beyond that.

He's not before the court saying, judge, I'm so sorry. He said, through his own words, he doesn't want to minimize what he's done. He's know what he's done and he knows what he's done is very serious. As we stand here today, what's his future? What's going to happen to him over the next 13, 14, 15 years? What's going to happen to him? Is he equipped with anything that would give the court at least an inkling that something positive may come out of this? And I think it's there.

He has a proclivity to learn.

THE COURT: I'm delighted to have heard him say that over the last four years of incarceration he has learned a lot and feels very much like a different person. It's not that he's not accepting responsibility for what he did at that time, but that he is feeling like a different person and I really hope the experience brings you to be a very different person.

Your lawyers have shown a lot of faith in you and they are very good lawyers and it's obvious you are articulate, you are bright. I can understand how obviously this could happen. There are some terrible factors in your background. But what you did was terrible and you know that.

THE DEFENDANT: Yes.

THE COURT: And I think you do want a different life.

THE DEFENDANT: Yes, I do.

THE COURT: I'm sorry. I didn't mean to cut you off.

MR. RICCO: Judge, I think I have exhausted all the things I want to say about the case. I just find that the one positive aspect in my view that has come out of Booker is a very troubling dichotomy that the guidelines precluded which was we could consider the fact that he's been in jail since he's fourteen but we can't factor in the why question in terms of determining sentence. Because sometimes the why question really helps the court get a sense that the sentence that's being imposed fits. It fits the defendant.

THE COURT: I think the why question comes within the history and characteristics of the defendant.

MR. RICCO: Yes.

THE COURT: And I do believe you've made every argument that could be made on the subject.

Candidly, I think he has benefited greatly by the plea agreement. And I am accepting not only that agreement but both of your justifications for why that's an appropriate sentence under the sentencing factors, which obviously dramatically limits Mr. Chaney's exposure, beyond dramatically. I just want to make sure I understood what Mr. Weiser's request was.

What was your request, Mr. Weiser?

MR. WEISER: In terms of sentence, your Honor?

THE COURT: Right.

MR. WEISER: It is for a sentence, a consecutive sentence, at a minimum of between 157 and 166 months.

MR. RICCO: Judge, may I have a moment?

MR. WEISER: 120 months of which - -.

THE COURT: That's mandatory.

MR. WEISER: Mandatory.

THE COURT: Consecutive.

I'm going to sentence Mr. Chaney on counts 1 and 6 to concurrent terms of 46 months of imprisonment, to be served consecutively to the undischarged state term that was previously imposed on him.

And on count seven, I sentence him to the custody of the attorney general for a period of 120 months imprisonment to be served consecutively to all other prison terms which I understand is both statutorily and under the law including supreme court precedent required.

Now, it's not clear to me that any of the amounts that might make up restitution under the authorities in the sentencing guidelines are amounts that I could impose. As I see it, I understand that this is a sentence under the sentencing statute. Candidly, I don't think restitution would be appropriate here, in any event. Mr. Chaney is going to be incarcerated

for a lengthy period of time. Unless somebody can explain it to me differently, it does not seem to be as we have construed it restitution pursuant to count six of conviction. This is the Melissa check cashing and the Gulf gas station robbery. As I understand it, neither of those were the basis of count six which is really the substantive basis.

I would like to hear your views on this.

MR. WEISER: Your Honor, the defendant was also convicted of count one.

THE COURT: I understand that.

MR. WEISER: The government's understanding encompasses -- under your Honor's understanding -- every robbery except the Melissa check cashing robbery.

THE COURT: I don't know.

MR. WEISER: Perhaps if we deduct out the Melissa check cashing robbery.

THE COURT: It's a very strange situation to be in. You agreed on guidelines that you now agreed you would like to adhere to because you agree they are the incorrect guidelines. The guidelines that were agreed on would not permit restitution because a conspiracy under those guidelines doesn't incorporate either the Melissa or the Gulf gas station.

MR. WEISER: Why does the conspiracy not incorporate those robberies?

THE COURT: Had the guidelines been, as you determined them to be, I think as we all agree the Probation Department is not incorrect that at least,

understanding the guidelines, all of those would have been counted as separate crimes under the conspiracy which is what would have led us to a much broader range of imprisonment. I just began to think that the whole thing is quite academic because Mr. Chaney is going to be in prison for a substantial period of time.

MR. WEISER: Your Honor, the only hesitation that the government has is one that I believe under 18 USC Section 3663 A restitution is mandatory.

THE COURT: But it's mandatory with respect to counts of conviction.

MR. WEISER: Right.

THE COURT: And that's what is a little confusing here.

MR. WEISER: I think the count of conviction for count one, however, is for committing all of those robberies. Between October and December 2002 he committed approximately 15 robberies. The government's view is he pled guilty to that crime and the court found him guilty of that crime and all of these underlying acts are what he did that made him guilty of that crime. All of those robberies he did are part of that same conspiracy.

(Pause.)

MR. WEISER: Your Honor, I understand the issue from your perspective and certainly the government agrees from a practical standpoint that it's largely an academic issue whether your Honor orders restitution or not, obviously because of that nature, we don't care to entertain.

THE COURT: I'm not going to order restitution and I will not impose a fine.

I will order five years of supervised release, with special conditions obviously prohibiting the possession of a firearm, ammunition or destructive device. I'm also going to require any vocational training and/or employment recommended by the Probation Department.

Are there any other kinds of programs that the Probation Department would recommend that I should right now make part of this sentence?

THE PROBATION OFFICER: Perhaps an educationally-related program as well.

THE COURT: That will be fine. I will include that, too. I'm going to impose, because of the weapons use, a search condition that the defendant's premises, automobile and any other premises under control be subject to a search upon reasonable suspicion that contraband or that evidence of a crime may be found, that obviously this must be done in a reasonable manner and at a reasonable time. The defendant's refusal to submit to a search would be a revocation, grounds for revocation, and he should advise anyone else in his household about this special condition.

I believe I indicated that in my view he is unable to pay a fine. But I will impose a three hundred dollar special assessment.

MR. WEISER: Yes, your Honor.

THE COURT: A mandatory three hundred dollar special assessment.

THE PROBATION OFFICER: Your Honor, may we also impose, as suggested by the government, mental health counseling, if necessary?

THE COURT: That would be fine. I don't see the need for drug counseling. But I think mental health counseling, possibly anger management, whatever the Probation Department deems appropriate.

Mr. Chaney, I know it seems like extra punishment. This is an opportunity when you get out -- for five years -- to have someone help you put it back together, so you don't end up spending your life in jail. I don't want to see it any more than you want to see it. I mean I think all of us are hoping that you will be able to put your life back together, that you'll learn something from this experience and this period of supervised release, though somewhat lengthy, is an opportunity to get a lot of help and I hope you look at it that way.

So there are open counts.

MR. WEISER: Yes, your Honor. The government moves to dismiss the open counts of the indictment.

THE COURT: And that motion is granted.

Mr. Chaney, there are circumstances in which a defendant may appeal the sentence. I don't believe that it would apply in your case. But if you choose to appeal a notice of appeal must be filed within ten days and undoubtedly your lawyers would continue the represent you.

MR. RICCO: One other issue, your Honor.

Would your Honor consider a recommendation to the Bureau of Prisons that the defendant be allowed to serve his time in the New York area, specifically Otisville facility, if possible.

THE COURT: I'll say the New York area, if possible, a designation to Otisville.

MR. RICCO: He recognizes it's just a recommendation.

Thank you very much, your Honor.

MR. WEISER: Thank you, your Honor.

OooOooO

Office of the Attorney General
Washington D.C. 20530

September 22, 2003

TO: All Federal Prosecutors
FROM: John Ashcroft, Attorney General
SUBJECT: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing

Introduction

The passage of the Sentencing Reform Act of 1984 was a watershed event in the pursuit of fairness and consistency in the federal criminal justice system. With the Sentencing Reform Act's creation of the United States Sentencing Commission and the subsequent promulgation of the Sentencing Guidelines, Congress sought to "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). In contrast to the prior sentencing system -- which was characterized by largely unfettered discretion, and by seemingly severe sentences that were often sharply reduced by parole -- the Sentencing Reform Act and the Sentencing Guidelines sought to accomplish several important objectives: (1) to ensure honesty and transparency in federal sentencing; (2) to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and (3) to provide for the imposition of appropriately different punishments for offenses of differing severity.

With the passage of the PROTECT Act earlier this year, Congress has reaffirmed its commitment to the principles of consistency and effective deterrence that are embodied in the Sentencing Guidelines. The important sentencing reforms made by this legislation will help to ensure greater fairness and to eliminate unwarranted disparities. These vital goals, however, cannot be fully achieved without consistency on the part of federal prosecutors in the Department of Justice. Accordingly, it is essential to set forth clear policies designed to ensure that all federal prosecutors adhere to the principles and objectives of the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines in their charging, case disposition, and sentencing practices.

The Department has previously issued various memoranda addressing Department policies with respect to charging, case disposition, and sentencing. Shortly after the constitutionality of the Sentencing Reform Act was sustained by the Supreme Court in 1989, Attorney General Thornburgh issued a directive to federal prosecutors to ensure that their practices were consistent with the principles of equity, fairness, and uniformity. Several years later, Attorney General Reno issued additional guidance to address the extent to which a prosecutor's individualized assessment of the proportionality of particular sentences could be considered.

The recent passage of the PROTECT Act emphatically reaffirms Congress' intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced. It is therefore appropriate at this time to re-examine

the subject thoroughly and to state with greater clarity Department policy with respect to charging, disposition of charges, and sentencing. One part of this comprehensive review of Department policy has already been completed: on July 28, 2003, in accordance with section 401(l)(1) of the PROTECT Act, I issued a Memorandum that specifically and clearly sets forth the Department's policies with respect to sentencing recommendations and sentencing appeals. The determination of an appropriate sentence for a convicted defendant is, however, only half of the equation. The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.

Accordingly, the purpose of this Memorandum is to set forth basic policies that all federal prosecutors must follow in order to ensure that the Department fulfills its legal obligation to enforce faithfully and honestly the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines. This memorandum supersedes all previous guidance on this subject.

I. Department Policy Concerning Charging and Prosecution of Criminal Offenses

A. General Duty to Charge and to Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions

It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below. The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence. A charge is not "readily provable" if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial. Thus, charges should not be filed simply to exert leverage to induce a plea. Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted in Section B.

B. Limited Exceptions

The basic policy set forth above requires federal prosecutors to charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence. There are, however, certain limited exceptions to this requirements:

1. Sentence would not be affected. First, if the applicable guideline range from which a sentence

may be imposed would be unaffected, prosecutors may decline to charge or to pursue readily provable charges. However, if the most serious readily provable charge involves a mandatory minimum sentence that exceeds the applicable guideline range, counts essential to establish a mandatory minimum sentence must be charged and may not be dismissed, except to the extent provided elsewhere below.

2. "Fast-track" programs. With the passage of the PROTECT Act, Congress recognized the importance of early disposition or "fast-track" programs. Section 401(m)(2)(B) of the Act instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels "pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (emphasis added). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the same requirement will also apply, as a matter of Department policy, to any fast-track program that relies on "charge bargaining" -- i.e., an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense. Such programs are intended to be exceptional and will be authorized only when clearly warranted by local conditions within a district. The specific requirements for establishing and implementing a fast-track program are set forth at length in the Department's "Principles for Implementing An Expedited or Fast-Track

Prosecution Program." In those districts where an approved "fast-track" program has been established, charging decisions and disposition of charges must comply with those Principles and with the other requirements of the approved fast-track program.

3. Post-indictment reassessment. In cases where post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason (e.g., the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant), the prosecutor may dismiss the charge(s) with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

4. Substantial assistance. The preferred means to recognize a defendant's substantial assistance in the investigation or prosecution of another person is to charge the most serious readily provable offense and then to file an appropriate motion or motions under U.S.S.G. § 5K1.1, 18 U.S.C. § 3553(e), or Federal Rule of Criminal Rule of Procedure 35(b). However, in rare circumstances, where necessary to obtain substantial assistance in an important investigation or prosecution, and with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, a federal prosecutor may decline to charge or to pursue a readily provable charge as part of plea agreement that properly reflects the substantial assistance

provided by the defendant in the investigation or prosecution of another person.

5. Statutory enhancements. The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases. As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district. Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but only in the context of a negotiated plea agreement, and subject to the following additional requirements:

> a. Such authorization must be written or otherwise documented and may be granted only after careful consideration of the factors set forth in Section 9-27.420 of the United States Attorneys' Manual. In the

context of a statutory enhancement that is based on prior criminal convictions, such as an enhancement under 21 U.S.C. § 851, such authorization may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.

b. A prosecutor may forego or dismiss a charge of a violation of 18 U.S.C. § 924(c) only with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, and subject to the following limitations:

(i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.

(ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations.

6. Other exceptional circumstances. Prosecutors may decline to pursue or may dismiss readily provable charges in other exceptional circumstances with the written or otherwise

documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring the practical limitations of the federal criminal justice system. For example, a case-specific approval to dismiss charges in a particular case might be given because the United States Attorney's Office is particularly over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. However, such case-by-case exceptions should be rare; otherwise the goals of fairness and equity will be jeopardized.

II. Department Policy Concerning Plea Agreements

A. Written Plea Agreements

In felony cases, plea agreements should be in writing. If the plea agreement is not in writing, the agreement should be formally stated on the record. Written plea agreements will facilitate efforts by the Department of Justice and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the Sentencing Guidelines. The PROTECT Act specifically requires the court, after sentencing, to provide a copy of the plea agreement to the Sentencing Commission. 28 U.S.C. § 994(w). Written plea agreements also avoid misunderstandings with regard to the terms that the parties have accepted.

B. Honesty in Sentencing

As set forth in my July 28, 2003 Memorandum on "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," Department of Justice policy requires honesty in sentencing, both with respect to the facts and the law:

> Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

This policy applies fully to sentencing recommendations that are contained in plea agreements. The July 28 Memorandum further explains that this basic policy has several important implications. In particular, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Likewise, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing.

The current provision of the United States Attorneys' Manual that addresses charging policy and that describes the circumstances in which a less serious charge may be appropriate includes the admonition that "[a] negotiated plea which uses any of the options described in this section must be made

known to the sentencing court." See U.S.A.M. § 9-27.300(B); see also U.S.A.M. § 9-27.400(B) ("it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure"). Although this Memorandum by its terms supersedes prior Department guidance on this subject, it remains Department policy that the sentencing court should be informed if a plea agreement involves a "charge bargain." Accordingly, a negotiated plea that uses any of the options described in Section I(B)(2), (4), (5), or (6) must be made known to the court at the time of the plea hearing and at the time of sentencing, i.e., the court must be informed that a more serious, readily provable offense was not charged or that an applicable statutory enhancement was not filed.

C. Charge Bargaining

Charges may be declined or dismissed pursuant to a plea agreement only to the extent consistent with the principles set forth in Section I of this Memorandum.

D. Sentence Bargaining

There are only two types of permissible sentence bargains.

1. Sentences within the Sentencing Guidelines range. Federal prosecutors may enter into a plea agreement for a sentence that is within the specified guideline range. For example, when the Sentencing Guidelines range is 18 -- 24 months, a

prosecutor may agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, a prosecutor may agree to recommend a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 if the prosecutor concludes in good faith that the defendant is entitled to the adjustment.

2. Departures. In passing the PROTECT Act, Congress has made clear its view that there have been too many downward departures from the Sentencing Guidelines, and it has instructed the Commission to take measures "to ensure that the incidence of downward departures [is] substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003). The Department has a duty to ensure that the circumstances in which it will request or accede to downward departures in the future are properly circumscribed.

Accordingly, federal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney. Likewise, except in such circumstances and with such authorization, prosecutors may not simply stand silent when a downward departure motion is made by the defendant.

An Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to request or accede to a downward departure at sentencing only in the following circumstances:

a. Substantial assistance. Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the Government, a court may depart from the guideline range. A substantial assistance motion must be based on assistance that is substantial to the Government's case. It is not appropriate to utilize substantial assistance motions as a case management tool to secure plea agreements and avoid trials.

b. "Fast-track" programs. Federal prosecutors may support a downward departure to the extent consistent with the Sentencing Guidelines and the Attorney General's "Principles for Implementing An Expedited or Fast-Track Prosecution Program." The PROTECT Act specifically recognizes the importance of such programs by requiring the Sentencing Commission to promulgate a policy statement specifically authorizing such departures.

c. Other downward departures. As set forth in my July 28 Memorandum, "other than these two situations, however, Government acquiescence in a downward departure should be, as the Sentencing Guidelines Manual itself suggests, a "rare occurence." See U.S.S.G., Ch. 1, Pt. A, P(4)(b). Prosecutors must affirmatively oppose downward departures that are not supported by the facts and the law, and must not agree to "stand silent" with respect to such departures. In particular, downward departures that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.

Moreover, as stated above, Department of Justice policy requires honesty in sentencing. In those cases

where federal prosecutors agree to support departures, they are expected to identify departures for the courts. For example, it would be improper for a prosecutor to agree that a departure is warranted, without disclosing such agreement, so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining must honestly reflect the totality and seriousness of the defendant's conduct, and any departure must be accomplished through the application of appropriate Sentencing Guideline provisions.

Conclusion

Federal criminal law and procedure apply equally throughout the United States. As the sole federal prosecuting entity, the Department of Justice has a unique obligation to ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner.

cc: The Acting Deputy Attorney General

The Associate Attorney General

The Solicitor General

The Assistant Attorney General, Criminal Division

The Assistant Attorney General, Antitrust Division

The Assistant Attorney General, Civil Rights Division

The Assistant Attorney General, Environment and Natural Resources Division

The Assistant Attorney General, Tax Division

The Assistant Attorney General, Civil Division

The Director, Executive Office of United States Attorneys

No. 08-1011

In the Supreme Court of the United States

RODNEY REID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL A. ROTKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by preventing petitioner from cross-examining a cooperating witness about the mandatory minimum sentence associated with charges that were dismissed as a result of his cooperation, but otherwise allowing petitioner to elicit the witness's admission that his cooperation allowed him to avoid a potential sentence of life imprisonment plus 20 years.

2. Whether 18 U.S.C. 924(c) violates the Due Process Clause or the separation of powers.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A58-A65) is not published in the Federal Reporter but is reprinted in 300 Fed. Appx. 50.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. The petition for a writ of certiorari was filed on February 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to commit robbery of commercial establishments, in violation of 18 U.S.C. 1951(a); five counts of robbery of commercial establishments, in

violation of 18 U.S.C. 1951(a); and five counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to 150 months of imprisonment on the robbery and conspiracy offenses, to be served consecutively to 107 years of imprisonment on the firearm offenses. Pet. App. A17-A18. The court of appeals affirmed. *Id.* at A58-A65.

1. Between October and December 2002, petitioner and several accomplices committed a series of armed robberies of commercial establishments in Queens and Nassau Counties, New York. Gov't C.A. Br. 3. During one of the robberies, petitioner entered the establishment carrying a firearm; during others, he acted as a getaway driver or lookout. *Id.* at 4-10.

The robbers used a white Mitsubishi that belonged to petitioner and was registered to the mother of his daughter. Gov't C.A. Br. 4. Police identified the car and traced it to a motel, where they found petitioner and two of his accomplices. *Id.* at 10. After a standoff lasting several hours, petitioner and the accomplices surrendered. *Id.* at 11. The police then discovered $10,780 in cash in the lining of petitioner's jacket. *Ibid.* In the motel room, they found evidence from the robbery of a check-cashing service, including moneygrams, an employee's handbag, ammunition, and firearms. *Id.* at 11-12. A search of the Mitsubishi led to the discovery of bandanas and other items from the robbery. *Ibid.*

2. A federal grand jury in the Eastern District of New York returned an indictment charging petitioner with conspiracy to commit robbery, in violation of 18 U.S.C. 1951(a), seven counts of robbery, in violation of 18 U.S.C. 1951(a), and seven counts of possessing a firearm in furtherance of a crime of violence, in violation

of 18 U.S.C. 924(c). Pet. C.A. App. A15-A23. The case was tried by a jury.

At trial, the government presented the testimony of the robbery victims, videotapes made by security cameras, and fingerprint and ballistics evidence. Gov't C.A. Br. 3. It also presented the testimony of three of petitioner's accomplices: Woodroe Smith, Dashawn Spratley, and Omar Jones. *Ibid.*

Smith testified to his involvement in the robberies. On direct examination, the prosecutor asked, "[W]hat happens if you lie now?" and Smith replied, "I could face anywhere up to life plus 20 in jail." Gov't C.A. App. 25. On cross-examination, Smith admitted that he had been involved in insurance fraud and dealing illegal drugs, *id.* at 30, and that he had confessed to participating in 13 armed robberies, *id.* at 28. He also admitted that he was given immunity from prosecution for those crimes in exchange for his cooperation, *id.* at 32, and that he believed he had received a "pretty good deal," *id.* at 34. And he acknowledged that his cooperation agreement called for him to plead guilty to the robbery conspiracy and to a drug conspiracy, but that he was not required to admit to any of the individual robberies or any of the firearms charges. *Ibid.* Defense counsel then asked for permission to "explore [Smith's] recollection on the 924(c) count and that as part of the deal he did not have to plead guilty to any mandatory firearms sentences." 7/18/06 Tr. 436. The court advised counsel not "to use this witness simply to parade before the jury the consequences of a 924 conviction." *Ibid.* Counsel thereafter reiterated that Smith had committed 13 armed robberies and had never pleaded guilty to a single firearms charge. Gov't C.A. App. 36-37.

Spratley's testimony was similar. On cross-examination, petitioner's co-counsel elicited testimony that his cooperation agreement insulated him from any gun charges. Gov't C.A. App. 50. Spratley acknowledged that "there's a federal charge that using and carrying a firearm in connection with a crime is a separate crime itself," and he admitted that the terms of his plea agreement did not require him to plead guilty to any firearm charges even though he had used a firearm during some of the robberies. *Ibid.*; see *id.* at 51. But the court did not permit him to testify about the mandatory minimum sentence under Section 924(c). *Id.* at 50.

In anticipation of the testimony of the third accomplice, Jones, petitioner's co-counsel stated his understanding that the court had ruled that "it's inappropriate to ask [accomplices] about the failure of the government to charge them with 924(c) violations." Pet. C.A. App. A121. The court responded, "I didn't say you couldn't cross-examine about the failure to charge 924(c). * * * Every accomplice has been cross-examined about that. I said I don't want before the jury the fact that there is a mandatory sentence that accompanies that." *Ibid.* On cross-examination, Jones acknowledged that he had pleaded guilty in state court and was testifying under a grant of immunity that did not require him to plead guilty to any firearms charges. Gov't C.A. App. 86-88.

The jury found petitioner guilty of conspiracy, five counts of robbery, and five counts of possessing a firearm in furtherance of a crime of violence. The jury found him not guilty of two of the robbery counts and two of the firearms counts. Gov't C.A. Br. 12-13.

3. Petitioner moved for a new trial, arguing, among other things, that the court's refusal to allow him to cross-examine the cooperating witnesses about the man-

datory minimum sentences associated with the gun charges they faced violated his rights under the Confrontation Clause of the Sixth Amendment. The district court denied the motion, stating that it had excluded the testimony under Federal Rule of Evidence 403 because "the probative value of this testimony [was] far outweighed by its prejudicial impact and tendency to confuse the jury." Pet. App. A31. "This was especially so," the court explained, "in view of the other cross-examination" that was permitted, which "afford[ed] more than ample information for the jurors to make a discriminating appraisal of the cooperating witness' motives for testifying falsely, including lengthy testimony concerning their extensive criminal histories, their prior inconsistent statements, the details of their cooperation agreements, and the Government's agreement to limit the charges against them." *Id.* at A32. The court emphasized that "the witnesses testified to their understanding that they faced a potential sentence of life imprisonment plus 20 years," and this "highly specific testimony" was "plainly sufficient to permit a jury to appreciate the strength of their incentive to provide testimony satisfactory to the prosecution." *Ibid.* And the court noted that the testimony petitioner sought was "marginally relevant at best" and would have "severely prejudiced the Government and confused the jury" by allowing the jury to take into account petitioner's possible sentence if he was convicted. *Id.* at A33.

The district court sentenced petitioner to 150 months of imprisonment on the conspiracy count and the robbery counts. Pet. App. A17. It also imposed a mandatory consecutive term of 107 years of imprisonment on the five firearms counts. *Ibid.*; see *Deal* v. *United States*, 508 U.S. 129 (1993).

4. The court of appeals affirmed. Pet. App. A58-A65. The court rejected petitioner's claim that the district court had improperly curtailed his cross-examination of the cooperating witnesses. *Id.* at A61-A62. The court of appeals held that the district court had not abused its discretion, because petitioner "already had elicited testimony from the cooperating witnesses reflecting their motivation to lie and their extensive criminal histories," and the district court "was understandably reluctant to expose the jury to potentially highly prejudicial information" about the sentence petitioner faced if convicted under Section 924(c). *Id.* at A62.

The court of appeals also rejected petitioner's assertion that Section 924(c) "vests excessive sentencing authority in the executive branch." Pet. App. A64. The court held that "the Constitution permits the exercise of prosecutorial discretion in charging section 924(c) violations absent use of 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at A64-A65 (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)).

ARGUMENT

Petitioner asserts (Pet. 7-26) that the Confrontation Clause prohibits district courts from limiting a defendant's cross-examination of a cooperating witness about the mandatory minimum sentences he avoided as a result of his cooperation. The court of appeals correctly rejected that claim. Although there is some disagreement in the courts of appeals on the question presented, petitioner overstates the extent of those differences, and in any event this case is not a suitable vehicle for considering the issue. Petitioner also argues (Pet. 26-38) that the mandatory sentencing provision of 18 U.S.C. 924(c)

violates the Due Process Clause and the separation of powers. That claim lacks merit, and further review is not warranted.

1. a. The court of appeals correctly held that the district court did not abuse its discretion when it restricted petitioner's cross-examination of witnesses about the specific penalties associated with charges that they did not face, but that petitioner did face. "[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986). This Court has recognized, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679.

In this case, the district court explained that it "determined to preclude [petitioner's] inquiry pursuant to the requirements of Federal Rule of Evidence 403 because [it] viewed the probative value of this testimony as far outweighed by its prejudicial impact and tendency to confuse the jury." Pet. App. A31. That ruling was a permissible exercise of the district court's discretion. Petitioner was permitted to cross-examine the witnesses about a variety of subjects—including all of their extensive criminal undertakings, their prior inconsistent statements, and their cooperation agreements with the government—and the jury therefore possessed sufficient information to make a discriminating appraisal of the witnesses' motives to testify falsely. *Id.* at A32. Petitioner cross-examined the cooperating witnesses about

the details of their cooperation agreements, and in fact, the agreements themselves were received in evidence. Gov't C.A. App. 116, 125. As the district court found, "[w]hether the witness[es] might have faced even higher hypothetical mandatory minimum sentences on uncharged firearms counts had they breached their cooperation agreements would not have added any significant new information for the jury's consideration." Pet. App. A32-A33.

In addition, the information that petitioner sought to elicit was highly prejudicial, because petitioner himself was charged with seven Section 924(c) counts. Permitting cross-examination about the mandatory sentences associated with those counts would have informed the jury of the sentences that would have followed if petitioner were convicted, thereby creating a significant risk of prejudice to the government. Pet. App. A33; see *Shannon* v. *United States*, 512 U.S. 573, 579 (1994) ("[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."). The district court reasonably balanced that risk of prejudice against the limited probative value of the evidence in deciding to limit petitioner's questioning under Rule 403. Its fact-intensive exercise of discretion, which the court of appeals affirmed, does not warrant this Court's review.[1]

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[1] Petitioner argues (Pet. 14-19) that historical practice supports recognizing a right to inform the jury about the mandatory sentence that a cooperating witness avoids, but he offers no evidence of a right to cross-examine witnesses on that issue. Rather, he suggests that in the framing era, juries were aware of the penalties that defendants faced and sometimes returned verdicts that avoided especially harsh

b. Three courts of appeals have applied reasoning analogous to that applied by the court below to uphold restrictions on cross-examination of cooperating witnesses about mandatory sentences that they avoided. See *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995), cert. denied, 517 U.S. 1234 (1996); *United States* v. *Cropp*, 127 F.3d 354, 360 (4th Cir. 1997), cert. denied, 522 U.S. 1098 (1998); *United States* v. *Nelson*, 39 F.3d 705, 708 (7th Cir. 1994). Petitioner contends (Pet. 8-14) that those decisions conflict with *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1647 (2008), and *United States* v. *Chandler*, 326 F.3d 210 (3d Cir. 2003). While there is some tension in the circuits on whether a defendant has a confrontation right to cross-examine a cooperating witness on a mandatory minimum sentence that his cooperation may permit him to avoid, there is no conflict warranting this Court's review.

In *Larson*, the Ninth Circuit held that the defendants' Confrontation Clause rights were violated when they were not permitted to cross-examine a cooperating witness about the mandatory life sentence he faced in the absence of a substantial-assistance motion by the government. 495 F.3d at 1107 & n.14. At the same time, however, the court held that the error was harmless because counsel had an opportunity to "explore [the witness's] criminal past, history as a drug user and seller,

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penalties. But petitioner does not urge this Court to grant review on whether a defendant has a right to have the jury informed of the mandatory minimum sentence *he* faces (Pet. 25), so his historical evidence is irrelevant here. In any event, it is settled that evidence concerning the sentence that a defendant faces, when the jury lacks sentencing authority, may be excluded because it is confusing and distracting to the jury. *Shannon* v. *United States*, *supra*.

and desire to obtain a lesser sentence through his testimony against his co-conspirators." *Id.* at 1108. As the district court found, Pet. App. A32, those same considerations were present in this case. There is thus no reason to believe that, on these facts, the Ninth Circuit would reach a result different from that of the court below.

The decision in *Chandler* also does not squarely conflict with the unpublished decision in this case. In *Chandler*, the government limited the charges against one cooperating witness to those associated with a three-ounce sale of cocaine, despite evidence that he had engaged in the sale of five kilograms. 326 F.3d at 216-217. At trial, the witness testified that he was facing up to 18 months in prison for the three-ounce sale, but that he received only one month of house arrest. *Id.* at 217. On cross-examination, the district court barred Chandler's counsel from asking about the eight-year minimum Sentencing Guidelines sentence that the accomplice would have faced had he been charged with the full five kilograms. *Ibid.* While declining to decide whether a defendant has a categorical right to inquire into the "concrete terms" of a cooperating witness's agreement, *id.* at 221, the Third Circuit held that the district court's restriction on cross-examination had deprived the jury of a meaningful ability to assess the witness's credibility because it gave the jury "little reason to infer * * * that [the witness's] cooperation with the government might have meant the difference between more than eight years in prison, on the one hand, and the modest sentence he in fact received, on the other," *id.* at 222. As the district court noted here, however, this case is "easily distinguished" from *Chandler* because the jury was well aware of the magnitude of the reduction at issue, in that they knew that the witnesses "faced life plus 20

years" in the absence of their cooperation agreements. Pet. App. A32.[2]

c. Even if the question presented otherwise warranted review, this case would be a poor vehicle for considering it, for two reasons. First, petitioner raised no Sixth Amendment objection at trial to the court's ruling restricting his cross-examination. Although petitioner did refer to his Sixth Amendment rights in his new-trial motion and on appeal, he did not develop the constitutional argument he now presents in this court. It is well-settled that an objection to the admission or exclusion of evidence does not automatically preserve constitutional claims. See *California* v. *Green*, 399 U.S. 149, 156 (1970) ("[M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."); *United States* v. *Dukagjini*, 326 F.3d 45, 60 (2d Cir. 2003) ("We adhere to the principle that, as a general matter, a hearsay objection by itself does not automatically preserve a Confrontation Clause claim.") (collecting cases), cert. denied, 541 U.S. 1092 (2004). This Court does not ordinarily review questions not properly preserved below, and there is no reason to depart from that practice here.

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[2] Amicus Center on the Administration of Criminal Law relies (Br. 9) on *United States* v. *Cooks*, 52 F.3d 101 (1995), in which the Fifth Circuit held that the district court had erred in prohibiting questioning about the witness's "arrest for purse-snatching or [about] the stiff penalties [he] faced if convicted" on state drug charges. *Id.* at 103. That case is not relevant here because it did not involve a restriction on cross-examining a cooperating witness about a mandatory minimum sentence, and because the jury had no information concerning the serious penalties the cooperator faced.

Second, even if the district court's decision to restrict cross-examination was erroneous, the error was harmless beyond a reasonable doubt. As discussed above, the district court accorded petitioner ample latitude to explore the possible motives and biases of the government's cooperating witnesses, which resulted in the witnesses' having been thoroughly impeached. Cf. *United States* v. *Hoyte*, 51 F.3d 1239, 1243 (4th Cir.) (finding a lack of prejudice from the failure to disclose a witness's prior inconsistent statement, because the witness "was impeached in so many other ways"), cert. denied, 516 U.S. 935 (1995). Especially because the cooperating witnesses' testimony was corroborated by independent evidence establishing petitioners' guilt, any error was harmless.

2. Petitioner contends (Pet. 26-27) that prosecutorial charging decisions under statutes that require lengthy mandatory minimum sentences lead to "starkly different sentences for otherwise similarly situated defendants," in violation of the Due Process Clause, and impermissibly "unit[e]" the "power to prosecute and the power to sentence within the Executive Branch," in violation of the separation of powers. That claim lacks merit.

a. This Court has recognized that Congress's broad authority to determine the appropriate punishment for a federal crime includes the power to establish determinate sentences, see *Chapman* v. *United States*, 500 U.S. 453, 466-467 (1991), including a mandatory minimum sentence, *Harris* v. *United States*, 536 U.S. 545 (2002); *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). The government also has broad charging discretion in deciding which offenses to prosecute, which it may constitutionally exercise unless it improperly relies on race, religion, ethnicity, or some other protected characteristic.

See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456 (1996). A process by which Congress determines the appropriate punishment for violations of a criminal statute and the Executive enforces the statute in cases where the facts warrant it respects, rather than offends, the separation of powers.

Petitioner does not contend that the decision below conflicts with any decision of another court of appeals, and it does not. Instead, he suggests (Pet. 26-34) that the decision conflicts with *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *United States* v. *Booker*, 543 U.S. 220 (2005). That is incorrect. *Mistretta* upheld the constitutionality of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, and *Booker* held the Sentencing Guidelines unconstitutional insofar as they were mandatory and therefore permitted the maximum permissible punishment for an offense to be increased based on facts not found by a jury. Neither decision suggests that mandatory minimum sentences offend the Constitution, or that the Executive Branch transgresses the Constitution by deciding how many offenses to charge.

b. Citing a September 2003 memorandum issued by then-Attorney General John Ashcroft (Pet. 34-35), petitioner asserts that the government's charging decision in his case "violated the Department of Justice's own internal charging guidelines." Even if petitioner's reading of the memorandum were correct, an error by a government agency in interpreting its own internal guidelines would not establish a constitutional violation. *United States* v. *Caceres*, 440 U.S. 741, 752 (1979); see *United States* v. *Myers*, 692 F.2d 823, 846 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). In any event, as the district court observed, petitioner's assertion rests on a

selective and incorrect reading of those policies. Pet. App. A35.

The memorandum in question begins by setting forth "the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." Pet. App. A91. The memorandum acknowledges that there are "certain limited exceptions" to that "basic policy." *Ibid.* One such exception is that certain designated officials may "forego" the filing of a statutory enhancement, "but only in the context of a negotiated plea agreement, and subject to" the requirement that "[i]n all cases involving three or more readily provable violations of [Section] 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations." *Id.* at A94-A95. Contrary to petitioner's selective reading of the memorandum, the government's charging decision in this case in no way contravened that policy. Petitioner's case did not involve a "negotiated plea agreement," and, in any event, the thrust of the policy is to *require* charging at least the first two readily provable Section 924(c) offenses, not to prohibit more, especially in "exceptional cases." *Id.* at A95.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL A. ROTKER
Attorney

APRIL 2009

No. 08-1011

IN THE

Supreme Court of the United States

RODNEY REID,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

SAMUEL W. SEYMOUR
Counsel of Record
NICOLAS BOURTIN
ALLISON CAFFARONE
DAVID L. BREAU
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Petitioner

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I. This Case is the Proper Vehicle for Resolving the Circuit Split Concerning the Confrontation Clause's Guarantee of a Defendant's Right to Cross-Examine an Accomplice Witness about the Mandatory Minimum Sentence that the Witness Avoided by Cooperating with the Government.

There is a deep division among the federal circuit courts concerning the first question presented in this Petition: whether a defendant's Confrontation Clause rights are violated when the trial court bars the defendant from cross-examining accomplice witnesses about the mandatory minimum sentences that those witnesses avoided by cooperating with the government. Contrary to the government's assertion in its Brief in Opposition ("Gov't Br." 10), the Second Circuit's decision in this case is squarely in conflict with the Third Circuit's opinion in *United States* v. *Chandler*, 326 F.3d 210 (3d Cir. 2003), and the Ninth Circuit's *en banc* opinion in *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc)—as well as the Delaware Supreme Court's decision in *Wilson* v. *State*, 950 A.2d 634 (Del. 2008). These cases, in turn, are directly at odds with *United States* v. *Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), and *United States* v. *Cropp*, 127 F.3d 354 (4th Cir. 1997), which ruled in accordance with the court below.[1]

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[1] The government contends that the Seventh Circuit has sided with the First and Fourth Circuits, citing *United States* v. *Nelson*, 39 F.3d 705 (7th Cir. 1994). (Gov't Br. 9.) Although *Nelson* affirmed a district court's decision to bar cross-examination of accomplice witnesses about "the penalties they faced without their plea-bargains," *id.* at 708, it did not

A. The Government Incorrectly Minimizes the Deep Division Among the Circuits on this Issue.

In *Chandler*, the Third Circuit held that the defendant's Confrontation Clause rights were violated when the district court barred cross-examination of the accomplice witnesses about "the *magnitude* of the sentence reduction they believed they had earned, or would earn, through their testimony" because, had the witnesses been subject to such cross-examination, "the jury might have 'received a significantly different impression of [their] credibility.'" *Chandler*, 326 F.3d at 221 (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986)) (alteration in original). The *Chandler* holding directly conflicts with the district court's holding here, affirmed by the Second Circuit, that "the mandatory minimum sentences for the gun counts were of little, if any, probative value." (Pet. App. A33.)

The government contends that *Chandler* "does not squarely conflict" with the Second Circuit's decision in this case because, unlike in *Chandler*, the jury in this case was "well aware of the magnitude of the reduction" that the three cooperating witnesses received. (Gov't Br. 10.) The government's

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distinguish between minimum and maximum sentences or between mandatory sentences and discretionary sentencing ranges. *Nelson* also gave no indication as to the basis for the district court's limitation of cross-examination on this issue or the existence of any concern that the jury would be alerted to the defendant's sentence. As such, *Nelson* does not address the question presented by Mr. Reid here.

argument is based on the faulty assumption that a *maximum* sentence of life plus twenty years is of the same magnitude—and provides the same incentive to fabricate or embellish the witness's testimony—as a *mandatory minimum* sentence of life imprisonment. That assumption defies reason.

If the three accomplice witnesses who testified at Rodney Reid's trial had not cooperated with the government, they would have faced mandatory minimum life sentences: Woodroe Smith would have faced a more than 300-year minimum sentence for the multiple violations of 18 U.S.C. § 924(c) to which he admitted; Dashawn Spratley would have faced a more than 100-year minimum sentence for the multiple Section 924(c) violations to which he admitted; and Omar Jones would have faced a mandatory life sentence for the armed robbery and numerous sales of guns and drugs to which he admitted.

The jury never learned of those facts or appreciated the powerful incentive that those potential sentences provided to those witnesses to embellish or falsify their testimony. To the contrary, Smith and Spratley both testified that they faced only a minimum of ten years' imprisonment and a maximum of life plus twenty years (Trial Tr. 301-03, 592); Jones testified that he had not been required to plead guilty to any federal crimes (Trial Tr. 899-902). The witnesses also testified about the benefit they each hoped to receive for cooperating: Smith, who had been in prison for less than three years at the time of Mr. Reid's trial, testified that he hoped to be sentenced to time served (Trial Tr. 439); Spratley

testified that he hoped to be sentenced only to probation (Trial Tr. 675); and Jones testified that he hoped to avoid any federal charges (Trial Tr. 901-02). Because none of the three cooperating witnesses were required to plead guilty to any of the Section 924(c) charges to which they admitted their guilt, they did not testify regarding—and the jury was not privy to—the lengthy mandatory minimum sentences they would have faced had they not cooperated.

The government compounded the jury's misapprehension when it argued in summation that if the witnesses had not cooperated, they merely faced a minimum sentence of ten years, with the maximum possibility of life plus twenty years. In reality, however, the witnesses' motive was to avoid dying in jail—a starkly more serious punishment, and one that carried a more powerful motive to fabricate or exaggerate their testimony in order to secure a cooperation agreement and a 5K letter from the government.

In short, just as in *Chandler*, the jury here was not aware of the astoundingly large benefit that the witnesses actually received by cooperating. The government's argument that this case is "easily distinguished" from *Chandler* on the grounds that Mr. Reid's jury was "well aware of the magnitude of the reduction" that the three cooperating witnesses received (Gov't Br. 10) and, thus, that there is not a split between the Second and Third Circuits, is unavailing.

Additionally, and again contrary to the government's assertion, the Ninth Circuit's decision

in *Larson* directly conflicts with the Second Circuit's decision in this case. In *Larson*, the Ninth Circuit unambiguously held that a court violates the Sixth Amendment when it prevents a defendant from cross-examining an accomplice witness about the mandatory minimum sentence he avoided by cooperating in order to keep the jury from learning about the mandatory minimum sentence applicable to the defendant. *Larson*, 495 F.3d at 1102-07. The government attempts to minimize this clear holding by emphasizing that the Ninth Circuit found the constitutional error there to be harmless error. (Gov't Br. 9-10.) But the fact that the constitutional error may have been harmless given the facts of that case does not change the unambiguous holding that the barring of such examination is unconstitutional.

Here, the district court held that "the mandatory minimum sentences for the gun counts were of little, if any, probative value on the incentive to lie of cooperators who acknowledged facing life plus 20 years." (Pet. App. A33.) The Second Circuit affirmed that holding. (Pet. App. A61-A62.) But as the Ninth Circuit explained, such testimony does not allow the jury to fully appreciate a witness's bias: "The potential maximum statutory sentence that a cooperating witness *might* receive . . . is fundamentally different from the *mandatory* minimum sentence that the witness *will* receive in the absence of a motion by the Government." *Larson*, 495 F.3d at 1106. "The former lacks significant probative force because a defendant seldom receives the maximum penalty permissible under the statute," whereas the latter "is a sentence that the witness knows *with certainty* that he will

receive unless he satisfies the government with substantial and meaningful cooperation so that it will move to reduce his sentence." *Id.* The district court's ruling barring cross-examination about the mandatory minimum sentences the accomplice witnesses avoided prevented the jury from adequately assessing the witnesses' bias because "*any* reduction from a mandatory life sentence is of such a significant magnitude that excluding this information denie[s] the jury important information necessary to evaluate [the witnesses'] credibility." *Id.* at 1107.

Chandler and *Larson* are directly at odds with the decision of the Second Circuit in this case and with the decisions of the First and Fourth Circuits in *United States* v. *Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), and *United States* v. *Cropp*, 127 F.3d 354 (4th Cir. 1997). In those cases, the Second, First, and Fourth Circuits held that a district court may bar cross-examination of an accomplice witness about the mandatory minimum sentences he would have faced had he been charged with additional crimes on the grounds that such examination would impermissibly inform the jury about the defendant's possible punishment. These decisions were in error, and this Court should grant the Petition to resolve the circuit split on this important issue.[2]

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[2] The government argues (Gov't Br. 9 n.1) that the historical practices Mr. Reid discussed in his opening brief (Pet. 14-19) are irrelevant. To the contrary, the fact that English and colonial juries knew or were told of the sentence a defendant faced demonstrates that courts in 1791 would not have abridged a defendant's Confrontation Clause rights simply to

B. Rodney Reid's Confrontation Clause Claim was Properly Preserved Because the Claim was Raised in the District Court and on Appeal.

The government suggests that Mr. Reid's Confrontation Clause claim was not properly preserved. (Gov't Br. 11.) This is incorrect.[3] The Sixth Amendment claim asserted by Mr. Reid in this Court was raised both in the district court and in the Second Circuit.

First, during cross-examination of Smith, defense counsel elicited that Smith had not been required to plead guilty to any of the 13 violations of Section 924(c) to which he had admitted. Counsel then tried to elicit Smith's understanding of the penalty that he had avoided as a result. On the prosecutor's objection, the district court barred that line of questioning, despite defense counsel's argument that he was "entitled to explore [Smith's] recollection on the 924(c) count" because "[t]his goes directly to the deal struck with the government. 13 times he committed firearms crimes. He didn't plead guilty one single time." (Trial Tr. 435-36.) Likewise, during Spratley's cross-examination the following day, defense counsel sought to elicit the mandatory minimum sentence Spratley avoided by not being

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prevent the jury from learning of the defendant's applicable mandatory minimum sentence.

[3] Tellingly, the government's Brief in Opposition to this Court is the first time that the government suggests that Mr. Reid's Confrontation Clause claim was not preserved. The government did not raise this argument in the Second Circuit.

required to plead guilty to the five armed robberies to which he admitted. The court again sustained the prosecutor's objection.

Before the testimony of Jones, the third accomplice witness, defense counsel orally moved the court to reconsider its ruling on this issue. (*See* Pet. App. A5-A10.) The court reiterated its ruling that the defense could not cross-examine Jones about the mandatory minimum sentence he avoided because it would alert the jury that Mr. Reid faced a similar mandatory minimum sentence. Defense counsel responded:

> I am not going to stray from this because I have your ruling but I will object. This is restraining our defense on a critical point because of the impact it would have on this jury if they understood that these witnesses are going to be given a deal that in some cas[es] avoids 55 years of mandatory time.

(Pet. App. A6.)

Second, Mr. Reid's post-trial motion for a new trial devoted several pages to the argument that the district court violated his "rights under the Confrontation Clause of the Sixth Amendment" when it refused to allow defense counsel "to cross-examine the co-conspirators concerning the mandatory minimum sentences carried by the firearms charges with which the co-conspirators were not charged pursuant to their cooperation agreements." (*See* Mem. of Law in Support of Defendant's Motion for

Judgment of Acquittal and/or New Trial 14-18.) In support of that motion, Mr. Reid specifically cited and discussed the Third Circuit's decision in *Chandler*, 326 F.3d 210.

Third, on appeal in the Second Circuit, Mr. Reid argued that the district court violated his Confrontation Clause rights "by refusing to permit defense counsel to cross-examine the government's cooperating witnesses concerning the mandatory minimum sentences carried by the firearms charges with which they were not charged." (*See* Def. C.A. Br. 17-21.)

In sum, the record clearly demonstrates that Mr. Reid preserved his Confrontation Clause claim for review by this Court.

C. The Constitutional Error by the Lower Courts was not Harmless Beyond a Reasonable Doubt.

The government argues that any constitutional error committed by the lower courts in this case was harmless beyond a reasonable doubt. (Gov't Br. 12.) This Court's precedent compels a contrary conclusion. In *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986), the Court held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." The Court explained that that inquiry depends on a number of factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence

corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Id.*

Here, application of the *Van Arsdall* factors demonstrates that the constitutional error was not harmless beyond a reasonable doubt. The testimony of the three accomplice witnesses was critical to the prosecution's case because it was the *only* evidence that Mr. Reid participated in four of the five armed robberies for which he was convicted—the witnesses' testimony about Mr. Reid's connection with these four robberies was not corroborated by any other evidence.[4] No physical evidence connected Mr. Reid to these four robberies—no fingerprint evidence implicated Mr. Reid, he could not be identified on any surveillance video, and fingerprint and ballistics evidence implicated only Spratley, Smith, and another accomplice. In addition, none of the more than ten victims who testified for the prosecution could identify Mr. Reid or testify to having ever seen him before.

Had the jury been alerted to the true magnitude of the benefit the accomplice witnesses earned by testifying, it would necessarily have made a more discriminating appraisal of the witnesses' credibility and would likely have discounted their

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[4] These four robberies were charged in counts 2, 4, 6, and 8 of the indictment; the firearms violations associated with these robberies were charged in counts 3, 5, 7, and 9. There was some corroborating evidence of Mr. Reid's participation in the robbery charged in count 14 and the associated firearms violation charged in count 15.

uncorroborated testimony concerning Mr. Reid's involvement in those robberies.

In short, the witnesses' testimony was critically important to the government's case, was not cumulative of other evidence, and was not corroborated by any other evidence. *See id.* As such, the district court's unconstitutional limitation of the cross-examination of those witnesses could not have been harmless beyond a reasonable doubt.

II. The Prosecutors' Unreasonable Decision to Stack Multiple Section 924(c) Charges against One Defendant—Mandating A Life Sentence—Violates the Separation of Powers Doctrine by Uniting the Power to Prosecute and the Power to Sentence in the Executive Branch.

The government contends that prosecutorial charging decisions must be upheld so long as they do not violate the Equal Protection Clause. (*See* Gov't Br. 12 (arguing that prosecutorial charging discretion is constitutionally exercised "unless it improperly relies on race, religion, ethnicity, or some other protected characteristic").) This assertion is wrong: charging decisions must conform to *all* constitutional requirements, not just the Equal Protection Clause. Here, the government's charging decision violated the separation of powers doctrine and due process, and resulted in Mr. Reid receiving a sentence that was over 100 years greater than those received by his similarly situated co-conspirators.

In its attempt to refute Mr. Reid's argument that the application of Section 924(c) in this case violated the separation of powers doctrine by impermissibly uniting the power to prosecute and the power to sentence within the Executive Branch, the government ignores the Court's reasoning in *United States* v. *Booker*, 543 U.S. 220 (2005), and *Mistretta* v. *United States*, 488 U.S. 361 (1989). The holdings in those cases were based in part on the Court's concern over vesting the Executive Branch with sentencing discretion. Here, by charging Mr. Reid with seven Section 924(c) violations, the government assured that Mr. Reid, if convicted, would die in prison. The court was left powerless to mitigate the unconscionable result. This Court should grant certiorari because allowing the government to unilaterally impose a mandatory life sentence on a defendant—where that sentence bears little, if any, relation to the defendant's real conduct—violates both the separation of powers doctrine and the defendant's Fifth Amendment right to due process.

CONCLUSION

For the foregoing reasons and the reasons cited in Mr. Reid's opening brief, the Court should grant a writ of certiorari in this case.

Respectfully submitted,

Samuel W. Seymour
Counsel of Record
Nicolas Bourtin
Allison Caffarone
David L. Breau
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Petitioner

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UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

ANTHONY S. BARKOW
RACHEL E. BARKOW
Center on the Administration of Criminal Law
110 West Third Street
Suite 214
New York, NY 10012
(212) 998-6612

JEFFREY L. BLEICH*
JONATHAN H. BLAVIN
Munger, Tolles & Olson LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
(415) 512-4000
Counsel for Amicus Curiae Center on the Administration of Criminal Law

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the Center on the Administration of Criminal Law (the "Center"), respectfully submits this brief in support of the petition for *certiorari*. The Center is dedicated to defining and promoting best practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. The Center's litigation program seeks to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts.

SUMMARY OF ARGUMENT

The Court should grant the petition for *certiorari* in order to resolve a clear conflict among the federal circuits on the important and recurring issue of whether the Confrontation Clause guarantees a criminal defendant the right to cross-examine an adverse government witness regarding the sentence the witness would have faced absent his cooperation with the government. In the case below, the Second Circuit joined the First and Fourth Circuits, which have held that the Confrontation Clause does not

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice, at least 10 days prior to the due date, of the Center's intention to file this brief. All parties have consented to the filing, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

guarantee such a right; these courts have reasoned that the defendant's interest in demonstrating bias is outweighed by a judicially-created policy against permitting the jury to learn the potential sentence faced by the defendant—information that might be revealed if the accomplice testifies to his potential sentence. *See United States v. Reid*, No. 08-0134-cr (2d Cir. Nov. 12, 2008). (A61-62.) These decisions directly conflict with decisions of the Third, Fourth (in an intra-circuit split), Fifth, and Ninth Circuits, which have held that the Confrontation Clause, as interpreted in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), gives defendants the right to confront witnesses concerning the specific penalties they would have faced absent government cooperation.

This split in the circuits concerns an issue of great importance to the fairness and integrity of criminal trials. As the decisions in the Third, Fourth, Fifth, and Ninth Circuits have recognized, the details of a government witness's cooperation with the government—and in particular the benefits the witness will obtain by testifying against the defendant—are highly probative of the credibility and bias of the cooperating witness, and thus are at the core of the protections the Confrontation Clause was intended to provide. The only rationale offered for the contrary rulings of the First, Fourth, and now Second Circuits is the concern that juries might be able to tell from the sentence that a cooperating witness avoided what sentence the defendant faces, and with that knowledge might nullify the verdict.

But a judicially-created prophylactic rule aimed at limiting nullification cannot outweigh a defendant's constitutional right to confront a witness regarding bias and motive to lie. While the Court in *Van Arsdall*

recognized that trial judges could impose "reasonable limits" on cross-examination, it made clear that it was not reasonable for a trial court to prohibit "*all* inquiry" into a factor that could suggest bias and that the "jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." 475 U.S. at 679 (emphasis in original). Yet the First, Second, and Fourth Circuits have done precisely that with their absolute bar on allowing defendants to cross-examine government witnesses about the sentencing relief they received in exchange for their testimony. It is hardly a "reasonable limit[]" to preclude a defendant entirely from asking a witness about his or her deal with the government when the avoidance of punishment is precisely the kind of motive that is at the core of the Confrontation Clause.

The history of the Confrontation Clause and the jury guarantee makes clear that the judicial policy against nullification cited by the First, Second, and Fourth Circuits cannot outweigh the constitutional right to confront witnesses about potential bias. The Petition details the longstanding right of a criminal defendant to confront the government's witnesses with any benefits they may have received in exchange for testifying. (Pet. 16-19.) The jury's power to apply the law to the facts, which, in turn, gives it the power to nullify, also is longstanding. Indeed, at the time of the Framing, the historical practice was that juries were advised not just of a witness's potential sentence, but also of the sentence faced by the defendant, precisely so that the jury would have the option of downgrading or nullifying a verdict that it perceived to be too harsh. This practice makes clear that there is no historical policy against nullification that can be weighed against the core Confrontation Clause right at issue here. On the contrary, the jury historically was

thought to serve as a valuable check against the powers of courts and prosecutors.

This checking role for the jury continues to be central to our system of criminal justice today, as evidenced by many of this Court's decisions. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Gaudin*, 515 U.S. 506 (1995).

In stark contrast to this well-established constitutional right of a defendant to cross-examine witnesses about bias are the relatively recent, judicially-created rules in some circuits that are designed to prevent jurors from learning about a defendant's potential sentence upon conviction. These prophylactic rules have no basis in the Constitution's text, in historical practice, or in policy. Accordingly, they must yield to a defendant's constitutional rights.

For these reasons, the Court should grant the Petition and reverse the judgment of the Second Circuit.

ARGUMENT

I. THE CIRCUITS ARE IN CONFLICT AS TO WHETHER A CRIMINAL DEFENDANT HAS A RIGHT UNDER THE CONFRONTATION CLAUSE TO CROSS-EXAMINE A GOVERNMENT WITNESS REGARDING THE SENTENCES THE WITNESS WOULD HAVE FACED ABSENT COOPERATION

There is a conflict in the federal circuits over whether the Confrontation Clause, as construed by this Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), guarantees a criminal defendant the right to

cross-examine a government witness regarding the sentence the witness would have received but for his cooperation. In *Van Arsdall*, the Court held that a criminal defendant has a right under the Confrontation Clause to cross-examine a government witness regarding the benefits the witness obtained in exchange for testifying against the defendant. *Id.* at 679. The defendant had been convicted of murder in Delaware state court. *Id.* at 674. During trial, the court prohibited the defendant from cross-examining a prosecution witness about the terms of the witness's agreement with the government, which included dismissal of a pending misdemeanor charge in exchange for the witness's cooperation. The Delaware Supreme Court reversed the conviction, holding that the order precluding cross-examination violated the Confrontation Clause. *Id.* at 678.

This Court granted *certiorari* and affirmed the finding of constitutional error. The Court held that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from conducting cross-examination designed to demonstrate "a prototypical form of bias" on the part of the witness, and thereby "'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Id.* at 680 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). The Court held that the trial court, by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony," violated the defendant's rights "secured by the Confrontation Clause." *Id.* at 679.

Four circuits—the Third, Fourth, Fifth, and Ninth—

have held that, under *Van Arsdall*, the Confrontation Clause gives a criminal defendant the right to cross-examine a government witness regarding the sentence the witness avoided by cooperating with the government.

By contrast, the First and Fourth (in an intra-circuit split), and now the Second Circuit, have found against such a right, relying on the theory that any right of confrontation is outweighed by the risk that the jury, if advised of the witness's potential sentence, might deduce the defendant's potential sentence and, based on that knowledge, engage in nullification.

A. The Circuits That Have Permitted Cross-Examination Have Recognized That the Right to Examine a Government Witness As to the Witness's Avoided Sentence Implicates the Core Concerns of the Confrontation Clause

The Third, Fourth, Fifth, and Ninth Circuits have held that under *Van Arsdall*, the defendant has the right to elicit testimony with respect to the *specific* sentence the government's witness has avoided by cooperating with the government. These courts have rejected government arguments that a defendant's Confrontation Clause rights can be satisfied by advising the jury of the existence (but not the terms) of a plea agreement with the government in exchange for a witness's testimony. Moreover, two circuits—the Third and Ninth—explicitly reject the argument that policy concerns about jury nullification outweigh any Confrontation Clause right.

In *United States v. Chandler*, 326 F.3d 210 (3d Cir. 2003), the defendant was convicted of participation in a drug-distribution conspiracy. *Id.* at 213. The

government called multiple members of the conspiracy to testify against the defendant. One of the witnesses testified on direct examination that he had sold roughly five kilograms of cocaine, and that under his agreement with the government, he was permitted to plead guilty to selling only three kilograms. *Id.* at 221. On cross-examination, he further acknowledged that pursuant to his plea agreement, the government had filed a motion urging a downward departure of his sentence. *Id.* The trial court, however, precluded defense counsel from eliciting from the defendant the fact that, absent his cooperation, he would have faced a sentence of between 97 and 121 months under the Sentencing Guidelines (approximately 8-10 years)—as distinguished from the relatively modest sentence he actually received. *Id.* at 221-22. Another witness in the same case testified that she had pled guilty to trafficking 15 to 50 kilos of cocaine. *Id.* at 222. Although the witness testified that she expected a downward departure for her cooperation, the court precluded defense counsel from inquiring into the specifics of this potential benefit, which amounted to avoidance of a sentence of between 151 and 188 months (approximately 12-15 years). *Id.*

Relying upon *Van Arsdall*, the Third Circuit reversed and remanded for a new trial. *Id.* at 224-25. The court had "little difficulty" concluding that a reasonable jury could have reached a significantly different impression of the credibility of the witnesses if it had known of the "enormous magnitude of their stake" in testifying against the defendant. *Id.* at 222. The court noted that the witnesses' mere acknowledgment that they would receive an unspecified benefit from the government was insufficient for the jury to appreciate the strength of their motive to provide testimony favorable to the

prosecution. *Id.* In comparison to the relatively modest benefit of the dismissal of the misdemeanor in *Van Arsdall*, the witnesses had received or expected a "benefit of far greater magnitude through [their] cooperation." *Id.* at 222. For these reasons, the court held that the district court violated the defendant's right to cross-examine the witnesses about facts that the court concluded bore directly on the jury's consideration of the weight, "if not the fact," of their motive to testify against the defendant—"facts, that is, which would have underscored dramatically their interest in satisfying the government's expectations of their testimony." *Id.*

The Third Circuit considered and rejected the risk of jury nullification purportedly resulting from such cross-examination. The court stated that, although it appreciated the government's interest in withholding information that might induce a jury to nullify the federal law that the defendant was accused of violating, such an interest was "outweighed" by the defendant's "constitutional right to confront" the witnesses against him. *Id.* at 223.

The Ninth Circuit reached a similar result in *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc). There, the defendant was convicted of conspiring to distribute methamphetamine. *Id.* at 1099. The trial court allowed defense counsel to question a government witness and co-conspirator about a potential reduction in his sentence, but prohibited counsel from eliciting the fact that the witness would have faced a minimum life sentence had he not cooperated. *Id.* at 1104-05. The Ninth Circuit in an en banc decision held that this was error. *Id.* at 1108-09. Citing *Van Arsdall* and *Chandler*, the court reasoned that a cooperating witness who faces a

statutorily mandated life sentence unless the government seeks a reduction of the sentence has a compelling incentive to testify in a manner favorable to the government. *Id.* at 1104. The court noted that the mandatory nature of the potential sentence, the length of the sentence, and the witness's strong motive to avoid such a sentence "cast considerable doubt on the believability" of the witness's testimony. *Id.*

As in *Chandler*, the Ninth Circuit expressly recognized the risk that a jury could infer the potential sentence faced by the defendant from the testimony regarding the witness's mandatory minimum sentence, and that such information could influence the jury's deliberative process, but held that such a risk was outweighed by the defendant's right to expose the bias of a cooperating witness who otherwise would face a mandatory life sentence. *Id.* at 1105.

The Fifth Circuit reached the same result in *United States v. Cooks*, 52 F.3d 101 (5th Cir. 1995). In that case, the defendant was convicted for conspiring to distribute cocaine. *Id.* at 103. The district court allowed cross-examination of a government witness regarding his status as a paid informant and his hopes for leniency on certain charges pending in Texas in exchange for his assistance in the investigation. *Id.* at 103-04. The court disallowed cross-examination about the witness's later arrest in Louisiana for purse-snatching or the severe penalties he faced if convicted on either the Texas or Louisiana charges—which would have amounted to a possible 99-year sentence on the Texas drug charges and a possible 40-year sentence for the Louisiana charge. *Id.* at 103 & n.13.

The Fifth Circuit held that this preclusion of cross-examination violated the defendant's rights under the Confrontation Clause. *Id.* at 104. Citing *Van Arsdall*,

the court held that the preclusion order prevented the jury from learning of important information bearing on the reliability of the witness—namely, his motive to avoid the consequences of his own crimes, "which, given their seriousness and his recidivism, might have been very severe in this case." *Id.* Given the obvious pressure to cooperate with the government, the court found there was a strong incentive for the witness, consciously or unconsciously, to "slant" his testimony. *Id.*

Finally, in *Hoover v. State of Maryland*, 714 F.2d 301 (4th Cir. 1983), the defendant was convicted in Maryland state court of second degree murder, and sought a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Id.* at 302. At trial, an accomplice-turned-government-witness revealed on direct examination that he had received a grant of immunity from prosecution for murder in exchange for his testimony against a murder defendant. *Id.* at 304. When defense counsel sought to inquire on cross-examination whether, as a result of his agreement with the government, the witness expected the prosecutor to intervene on his behalf in other unrelated pending criminal matters, the trial judge refused to permit the witness to be cross-examined about the amount of time in prison he thought he was avoiding by testifying against the defendant. *Id.*

The Fourth Circuit affirmed the order granting habeas corpus, holding that the trial court's refusal to allow inquiry into the witness's understanding of his bargain with the government violated the defendant's right to confront the witnesses against him. *Id.* at 306. The court emphasized that the "vital question, which the defendant is constitutionally entitled to explore by cross-examination, is what the *witness*

understands he or she will receive, for it is this understanding which is of probative value on the issue of bias. The likelihood that a prosecution witness is shading or even contriving testimony adverse to the defendant reasonably can be viewed as directly correlated with the perceived value of such testimony to the witness." *Id.* at 305 (emphasis in original).

B. The First, Second, and Fourth Circuits Have Held That Perceived Concerns Over Jury Nullification Outweigh a Defendant's Constitutionally-Guaranteed Right of Confrontation

The First, Second, and Fourth Circuits have declined to find Confrontation Clause violations in circumstances nearly identical to the above cases. These courts have held—incorrectly, as shown below—that the constitutional right of confrontation is outweighed by the perceived risk of jury nullification.

In *United States v. Cropp*, 127 F.3d 354 (4th Cir. 1997), the defendants were convicted of conspiring to distribute crack cocaine. *Id.* at 357. A number of the government's witnesses had been co-conspirators. The trial court precluded defense counsel from cross-examining these witnesses about the penalties they would have faced absent their cooperation. The Fourth Circuit, splitting with its own decision in *Hoover*, affirmed the district court's order precluding cross-examination on that subject. *Id.* at 358-59. The court based its decision entirely on the concern that the jury might nullify the verdict if it knew the penalties the defendant faced—information it might infer if it knew the witnesses' potential sentences. *Id.* at 358. The court dismissed the defendants' argument that, under *Van Arsdall*, they had a right to confront the witnesses regarding their avoided sentences. *Id.*

The court reasoned that "[a]gainst whatever slight additional margin of probative information gained by quantitative questions, we must weigh the certain prejudice that would result from a sympathetic jury when it learns that its verdict of guilty will result in sentences of ten and twenty years in prison." *Id.* at 359.

The Fourth Circuit in *Cropp*, *id.* at 359, relied heavily on *United States v. Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), in which the First Circuit held against a right of cross-examination regarding a government witness's potential sentence. *Id.* at 1153. The defendant was convicted of participating in a conspiracy to import cocaine and of firearms violations. *Id.* at 1148. At trial, the district court disallowed the defendant from cross-examining his cooperating co-conspirator regarding the sentence the witness would have faced on firearms counts—35 years in addition to the drug offense. *Id.* at 1153. The First Circuit affirmed the conviction over the defendant's argument that this preclusion order violated the Confrontation Clause. *Id.* Although the court acknowledged the holding in *Van Arsdall*, it concluded that the defendant had a "sufficient opportunity to expose potential biases, including any bias resulting from any benefit [the witness] received as a result of his cooperation" and that "[a]ny probative value of information about the precise number of years [the witness] would have faced had he been charged for the firearms offense was slight" and "outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing." *Id.*

The Second Circuit, in the case below, reached a similar result. Citing *Luciana-Mosquera*, the court

affirmed Petitioner's conviction over his argument that his Confrontation Clause rights were violated by being denied the opportunity to cross-examine the government's witnesses, his alleged accomplices, regarding the sentences they would have received but for their cooperation. The Second Circuit based its decision entirely on the risk of exposing the jury to "potentially highly prejudicial information regarding both the potential sentences the witnesses would have faced had they been charged and convicted," and the "sentence" Petitioner "actually faced under that statute." (A62.) The court did not even acknowledge this Court's decision in *Van Arsdall*, nor did it discuss the Confrontation Clause concerns that have driven the contrary decisions of other circuits.

II. THE PETITION RAISES IMPORTANT ISSUES CONCERNING THE ROLE OF THE CONFRONTATION CLAUSE IN CRIMINAL TRIALS

A. The Confrontation Clause Plays a Critical Role in Ensuring the Integrity of the Fact-finding Function of Criminal Trials

The Confrontation Clause ensures the criminal defendant the "right . . . to be confronted by the witnesses against him. . . . " U.S. Const., amend. VI. The "main and essential purpose" of the Clause is to secure the opportunity for cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). The Clause commands that the reliability of a witness's testimony "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

This Court has recognized that the "exposure" of a

witness's "motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-317 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). Indeed, the Court has said that cross-examination is the principal means by which the believability of a witness and the truth of the witness's testimony are tested. *Id.* at 316; *see also California v. Green*, 399 U.S. 149, 158 (1970). Cross-examination reveals "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand, . . . and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis*, 415 U.S. at 316 (citation and internal quotation marks omitted).

The Confrontation Clause thus not only tests the recollection and the conscience of the witness, but also "compel[s] him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). The right of cross-examination is more than a desirable rule of trial procedure; it "helps assure the 'accuracy of the truth-determining process'" and is an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The decisions of the Third, Fourth, Fifth, and Ninth Circuits discussed above all recognize that information concerning the potential sentence that a government witness may avoid by testifying goes to the central issue of credibility and potential bias. As the Fifth Circuit has noted, "[c]ounsel should be allowed great latitude in cross examining a witness regarding his

motivation or incentive to falsify testimony, and this is especially so when cross examining an accomplice or a person cooperating with the Government. . . . Indeed, the right of cross examination is so important that the defendant is allowed to 'search' for a deal between the government and the witness, even if there is no hard evidence that such a deal exists." *United States v. Landerman*, 109 F.3d 1053, 1063 (5th Cir. 1997) (quoting *United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1976)).

The First, Second, and Fourth Circuits have justified their preclusion of defense counsel's cross-examination into a cooperating witness's avoided sentence primarily on the theory that a jury's awareness of the avoided sentence creates a risk of jury nullification based on the sentence the defendant might face. But as this Court has stated, the "denial or significant diminution" of the right to confront and to cross-examine calls into question the integrity of the fact-finding process, and "requires that the competing interest be *closely examined*." *Chambers*, 410 U.S. at 295 (emphasis added). None of the decisions denying the Confrontation Clause right in this context engaged in any "clos[e] examin[ation]" of the nullification risk as against the strong interests in confrontation. As shown below, such an examination readily demonstrates that the concern over nullification is, at best, a perceived policy preference that is supported neither by historical practice nor sound policy and that cannot override the right of confrontation.

B. The Concern Over the Risk of Jury Nullification Is Unjustified

1. The Nullification Concern Is Contrary to the Jury's Historical Role As a Fundamental Constitutional Check on the Powers of Courts and the Other Branches of Government

The concern over possible jury nullification expressed by the First, Second, and Fourth Circuit opinions is contrary to historical precedent. Indeed, this rationale is directly *contrary* to historical practice and policy. During the Founding period, juries were made aware of the sentence that the defendant faced and were given the power to nullify the law through verdict when the sentence was perceived to be too harsh. In this way, juries served as a constitutional check on the powers of courts and prosecutors.

In eighteenth-century England and colonial America, juries were aware of a defendant's potential sentence (most crimes were well known to be capital crimes), and in fact played a critical role in determining that sentence. *United States v. Gaudin*, 515 U.S. 506, 513 (1995). Juries often issued "partial verdicts" or "downvalued" stolen goods in order to avoid death sentences, a widespread practice described by Blackstone as "pious perjury." WILLIAM BLACKSTONE, 4 COMMENTARIES *239 (1769); *see also* J. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 55 (1983) (noting that in eighteenth-century England "[t]he jury not only decided guilt, but it chose the sanction through its manipulation of the partial verdict").

Historical research shows that both before and after

the ratification of the Confrontation Clause, juries not only were basing their verdicts on potential punishments, but were deciding questions of law. R. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 66 n.148 (2003) (citing e.g., D. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 98-101 (1995)).

As the Court recognized in *Apprendi*, juries during this early period "devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant." *Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000). This reflected the jury's function as a political check on the courts and the other branches of government. The jury's role was to "inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity." Barkow, 152 U. PA. L. REV. at 59; *see also United States v. Powell*, 469 U.S. 57, 65 (1984) (discussing jury's "historic function" to act "as a check against arbitrary or oppressive exercises of power" in upholding inconsistent verdicts).[2] And indeed, lawmakers in the First Congress, which voted on the

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[2] *See also Jones v. United States*, 526 U.S. 227, 245 (1999) ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part. 4 Blackstone 238-239").

Bill of Rights, recognized this role for the jury. When Congress considered making forgery a capital offense, a prominent argument against adopting the legislation was that juries would not convict. *See* 1 ANNALS OF CONG. 1573-74 (Joseph Gales ed., 1834).

In the nineteenth century, the Court recognized limits on the jury's authority over pure questions of law. In *Sparf v. United States*, 156 U.S. 51 (1895), the Court concluded that "the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." *Gaudin*, 515 U.S. at 513. In addition, there was a general shift at that time away from criminal statutes that established fixed-term sentences to those providing judges with discretion within a permissible range. *Harris v. United States*, 536 U.S. 545, 558 (2002). This change led to the bifurcation of trials, with separate guilt and sentencing proceedings. J. Douglass, *Confronting Death: Sixth Amendment Rights At Capital Sentencing*, 105 COLUM. L. REV. 1967, 2019 (2005).

But these historical developments neither stripped the jury of its constitutional right to apply the law to the facts nor reduced the defendant's rights under the Confrontation Clause. As the Court made clear in its unanimous opinion in *Gaudin*, *Sparf* "in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of law to the facts." *Gaudin*, 515 U.S. at 513. The jury never has been, and is not today, a "mere factfinder." *Id.* at 514. It instead must "apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.*

Recent Court precedent has reaffirmed the central role of the jury as a vital check on the authority of the

courts and other branches of government. In *Apprendi*, the Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490. The Court emphasized that the "historical foundation for our recognition" of the right to an impartial jury "extends down centuries into the common law," to "'guard against a spirit of oppression and tyranny on the part of rulers,'" and to serve "'as the great bulwark of [our] civil and political liberties.'" *Id.* at 477. Similarly, in *Blakely v. Washington*, 542 U.S. 296, 305, 313 (2004), the Court held that a Washington state sentencing procedure was unconstitutional under *Apprendi*. The Court reasoned that the jury "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 305-06.

The jury's ability to serve as a critical check on government abuse comes from its power to apply the law to the facts as it sees fit. Some courts, worried that jurors will misuse this power and give insufficient respect to the law as defined by the judge, have sought to limit the information juries receive. For example, courts have refused to inform jurors of their power to nullify the law. These decisions amount to a judicially-created "'don't ask, don't tell' policy regarding nullification." Barkow, 152 U. PA. L. REV. at 68. Some jurists, like Judge Leventhal, have praised this line of authority for striking a "marvelous balance" that allows the jury to act as a "'safety valve' for exceptional cases, without being a wildcat or runaway institution." *United States v. Dougherty*, 473

F.2d 1113, 1134 (D.C. Cir. 1972). Other courts have similarly sought to limit the prevalence of nullification by fashioning rules that prevent the jury from finding out the possible sentencing consequences of their verdict. *See, e.g., United States v. Lewis*, 110 F.3d 417, 422 (7th Cir. 1997) (affirming district court's rejection of defendant's pre-trial request to "advise the jury about the sentencing consequences of a guilty verdict").

Prophylactic measures to limit the jury from discovering information about a defendant's possible sentence, which were adopted as a matter of judicial policy to limit nullification, cannot override the defendant's right to confront an accuser with facts that suggest possible bias. The First, Second, and Fourth Circuits erred in concluding that judicial policy concerns about the possibility for nullification can override clear-cut constitutional rights.

On the contrary, both the jury guarantee and the Confrontation Clause point to the same conclusion in this case, which is to allow a defendant to confront government witnesses about the sentencing discounts they will receive in exchange for testifying. This rule preserves the jury's historic, vital role within our constitutional and political structure as a fundamental check on government power. And it respects the core concern of the Confrontation Clause to allow defendants to cross-examine witnesses about their motives and biases.

Moreover, in this instance, even the judiciary's policy concerns with excessive nullification can be addressed without violating a defendant's constitutional rights. The jury could be instructed to reach its verdict without considering the possible sentence that might be imposed. And it could be instructed that any

information about a witness's potential sentence absent his or her deal with the government should be used solely to evaluate the testimony of the witness and for no other purpose. *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987) (observing that jurors are presumed to follow their instructions).[3]

With a limiting instruction in place, it is highly unlikely that information about a witness's potential sentence would trigger nullification. For that to occur, juries in these cases would need to infer that the witness's *perceived* avoided sentence is the same as the actual sentence the defendant faces, and then, on that basis and in disregard of the court's instructions, engage in nullification. It is hardly clear that such an inference can be reasonably expected. Moreover, this risk is also present when jurors know a defendant's possible penalty through other means—for example, because they are lawyers or law students with experience in the area, because they have friends or relatives who have faced similar charges, or they have read news accounts of sentencing. In these instances, these jurors are not stricken, but instead are presumed to follow the judge's instructions on the law. It would be perverse indeed to single out information obtained through a defendant's constitutionally-mandated right to cross-examination as being

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[3] As Petitioner notes, (Pet. 23-26), he is not seeking *certiorari* review with respect to whether criminal defendants possess a categorical right to inform juries of their potential sentences. Rather, he seeks only the significantly narrower right to cross-examine witnesses as to the potential sentences that *they as cooperating witnesses* may have avoided by testifying on behalf of the government. In all criminal cases where the government's case does not rely on cooperating witnesses who themselves may have avoided heftier sentences, the Court's ruling permitting such cross-examination would have no bearing.

uniquely incapable of being controlled through a limiting instruction.

Courts have relied on such limiting instructions in analogous contexts, and there is no reason to treat this area any differently. For example, courts have issued instructions providing that a "co-defendant's guilty plea may be admissible to impeach a government witness," but "may not be considered as evidence of the defendant's guilt." *Unites States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999); *see also Gov't of Virgin Islands v. Mujahid*, 990 F.2d 111, 115 (3d Cir. 1993). In such circumstances, an instruction is "necessary because admission of a co-defendant's guilty plea can be extremely prejudicial to the defendant, given the natural human tendency to assume that if an aider and abettor is guilty, the principal must also be guilty." *Prawl*, 168 F.3d at 626. If limiting instructions can cure the possibility of jury confusion in the context of a co-defendant's guilty plea, they can also address any concern with nullification.

2. Even If Some Instances of Nullification Might Follow from Revelations About a Cooperating Witness's Plea, This Too Is Consistent with Ensuring the Jury's Central Role In Determining Culpability

Any increase in nullification as the result of defense counsel's cross-examination of cooperating witnesses' avoided sentences is speculative. However, to the extent the possibility of increased nullification exists, that result is still consistent with the Constitution's contemplated role of the jury. The nineteenth-century shift from fixed-term sentences to those providing judges discretion within a set range arguably

diminished the equitable and political need for juries' involvement in sentencing matters. Today, however, there has been a return to fixed-term sentences, with widespread statutory mandatory minimums in crimes involving drugs, sex offenses, and firearms possession, such as those facing Petitioner and the accomplice witnesses who testified against him under 18 U.S.C. § 924(c)(1).[4]

Mandatory minimum sentences are in tension with the need "to create a fair, honest, and rational sentencing system" and "rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently." *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring). By denying judges "legal power to depart downward, no matter how unusual the special circumstances that call for leniency," statutory mandatory minimums "transfer sentencing power to

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[4] *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (increasing mandatory minimums for violent crimes against children, sex trafficking of children, and sexual offenses against children); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (imposing five- and ten-year mandatory minimum terms of imprisonment for possession of certain quantities of crack cocaine); Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (1984) (requiring imposition of a 15-year prison sentence for an individual with prior serious drug or violent felony convictions); 18 U.S.C. § 924(c)(1) (providing increasing mandatory minimum sentences for firearms use in connection with drug transactions and violent crimes); 21 U.S.C. § 841(b)(1) (prescribing five- and ten-year minimum sentences for various offences of drug manufacture and distribution); 21 U.S.C. § 960(b) (penalizing the importation and exportation of certain drugs by five-and ten-year minimums).

prosecutors, who can determine sentences through the charges they decide to bring . . . ." *Id.*

In this context, the defendant's interest in informing the jury of a potential sentence is greater than in the context of indeterminate sentencing. *See* K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1266 (1995). Under an indeterminate sentencing regime, sentencing discretion is distributed among the legislative, executive, and judicial branches. *Id.* Case-by-case judicial discretion functions as a check on potential executive and legislative branch excesses and helps to assure the fair imposition of laws passed by the legislature. *Id.* Minimum mandatory sentences, by contrast, disrupt this balance by increasing executive branch discretion and decreasing the possibility that a defendant will receive an individualized sentence. *Id.* In these circumstances, the "role of the jury as final protector against governmental overreaching becomes particularly significant." *Id.* at 1266-67.

III. THIS CASE PRESENTS A PROPER VEHICLE FOR THE COURT TO RESOLVE THE IMPORTANT CONFRONTATION CLAUSE ISSUE THAT HAS DIVIDED THE CIRCUITS

This case presents an appropriate vehicle for the Court to resolve the important and recurring Confrontation Clause issue raised by the Petition. As shown above, there is a clear split among the federal circuits. Petitioner squarely raised the issue before the Second Circuit, arguing that the district court violated the Confrontation Clause when it precluded him from cross-examining the government's witnesses about the sentences they avoided by testifying. The

Second Circuit rejected the argument and, relying on *Luciano-Mosquera*, aligned itself with the First and Fourth Circuits' treatment of the issue. Although the Second Circuit's discussion was brief, the issue has been fully vetted by the federal circuits on both sides of the split, including in the *Luciano-Mosquera* case on which the Second Circuit relied.

CONCLUSION

The Center respectfully urges the Court to grant the petition for *certiorari* and reverse the judgment of the Second Circuit.

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Respectfully submitted,

JEFFREY L. BLEICH*
JONATHAN H. BLAVIN
Munger, Tolles & Olson LLP
Counsel for Amicus Curiae Center on the Administration of Criminal Law

ANTHONY S. BARKOW
RACHEL E. BARKOW
Center on the Administration of Criminal Law

**Counsel of Record*